No. 97-115-CFX Title: Margaret Kawaauhau, et vir, Petitioners
v.
Paul W. Geiger

Docketed: July 18, 1997 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Jul 15 1997	Petition for writ of certiorari filed. (Response due August 17, 1997)
	Aug 18 1997	Brief of respondent Paul Geiger in opposition filed.
	Sep 3 1997	DISTRIBUTED. September 29, 1997
	Sep 29 1997	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 21, 1998. **********
	Oct 9 1997	Motion of petitioners to dispense with printing the joint appendix filed.
	Nov 7 1997	Brief of petitioners Margaret Kawaauhau and Solomon Kawaauhau filed.
	Nov 12 1997	Joint appendix filed.
	Nov 24 1997	Record filed.
	Dec 1 1997	Record filed.
	Dec 4 1997	CIRCULATED.
	Dec 12 1997	Brief amicus curiae of National Association of Consumer Bankruptcy Attorneys filed.
	Dec 15 1997	Brief of respondent Paul Geiger filed.
	Dec 31 1997	Reply brief of petitioners Margaret Kawaauhau and Solomon Kawaauhau filed.
	Jan 21 1998	ARGUED.

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,
Petitioners,

v.

PAUL W. GEIGER,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED

Must a Creditor seeking to except a claim from discharge pursuant to §523(a)(6) of the Bankruptcy Code as a willful and malicious injury prove that the Debtor intended to injure the Creditor?

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TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Margaret Kawaauhau and Solomon Kawaauhau, respectfully pray that a writ of certiorari be issued to review the judgment of the Eighth Circuit Court of Appeals entered in this proceeding May 14, 1997.

OPINIONS BELOW

The ruling of the United States Bankruptcy Court for the Eastern District of Missouri which excepted from discharge Petitioners' judgment against Geiger is reported at 172 B.R. 916 (Bankr. E.D. Mo. 1994).[1] The ruling of the United States District Court for the Eastern District of Missouri which affirmed the ruling of the Bankruptcy Court is unreported. The ruling of the Court of Appeals for the Eighth Circuit which reversed the District Court's affirmance of the Bankruptcy Court is reported at 93 F.3d 443 (8th Cir. 1996) which decision was subsequently vacated by the grant of Petitioner's suggestion for rehearing *en banc*. The Eighth Circuit at the rehearing *en banc* also reversed the District Court's affirmance of the Bankruptcy Court. *In re Geiger*, 113 F.3d 848 (8th Cir. 1997). The decisions are reprinted in Appendices A-D, *infra*.

STATEMENT OF JURISDICTION

The decision of the Eighth Circuit Court of Appeals was entered on May 14, 1997. This Court's jurisdiction to consider civil cases in the courts of appeals is invoked pursuant to 28 U.S.C. §1254(1).

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[1] The Bankruptcy Court for the Eastern District of Missouri's decision denying Geiger's Motion for Summary Judgment in an earlier summary judgment proceeding is reported at 114 B.R. 649 (E.D. Mo. 1990) but is not directly the subject of this petition for certiorari and is therefore not included in the appendix.

STATUTORY PROVISION INVOLVED

11 U.S.C. §523(a)(6)

STATEMENT OF THE CASE

Petitioner Margaret Kawaauhau visited Respondent/Debtor Physician Paul Geiger ("Geiger") for treatment of a severe infection in her leg at his office in Hawaii. Her symptoms consisted of pus oozing from a toenail, redness, swelling of the leg, fever and a high white blood count. Geiger admitted that he knew at the time of admission to the hospital that Mrs. Kawaauhau was in grave danger. Geiger admitted that he knew at that time that the appropriate course of treatment was intravenous penicillin and that he knowingly failed to provide such treatment. Geiger admitted that he knew the serious consequences of failing to provide adequate or proper treatment to a patient with Mrs. Kawaauhau's medical history and condition. Mrs. Kawaauhau lost her leg due to Geiger's malpractice. She filed suit and obtained a judgment against Geiger. Geiger subsequently fled Hawaii and started a new practice in St. Louis, Missouri. When his wages were garnished, Geiger filed for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §701 et seq., creating a bankruptcy estate where the only significant creditor was Mrs. Kawaauhau. The unsecured creditors, including the Kawaauhaus, received no distribution from the bankruptcy estate.

Petitioners filed a complaint in the United States Bankruptcy Court for the Eastern District of Missouri, Judge David P. McDonald presiding, to except their judgment from discharge as a willful and malicious injury under 11 U.S.C. §523(a)(6). The Bankruptcy Court excepted the malpractice judgment from discharge pursuant to 11 U.S.C. §523(a)(6). *In re Geiger*, 172 B.R. 916 (Bankr. E.D. Mo. 1994). While the evidence at the malpractice trial and the discharge trial was that Geiger intentionally ignored what he knew to be the proper standard of care and that Petitioner Kawaauhau lost her leg due to that malpractice, Petitioners did not and do not claim that Respondent intended to harm Mrs. Kawaauhau. The Court held that Geiger's conduct was malicious for purposes of §523(a)(6) because it "was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." Further, it constituted "disregard of acceptable medical practice..." "Dr. Geiger's egregious errors of judgment led to the worsening of Mrs. Kawaauhau's condition and to the eventual amputation of part of her leg." App., *infra*, A-13 and A-14.

Respondent appealed to the United States District Court for the Eastern District of Missouri, Chief Judge Jean C. Hamilton presiding, which affirmed the judgment of the Bankruptcy Court in an unpublished opinion. The District Court upheld the Bankruptcy Court's finding that Geiger's conduct was certain or substantially certain to cause physical harm and therefore constituted a willful and malicious injury, thus causing the debt to be non-dischargeable. App., *infra*, A-22.

Respondent then appealed to the United States Court of Appeals for the Eighth Circuit. The panel reversed the decision of the District Court, holding that the malpractice judgment should be not excepted from discharge. *In re Geiger*, 93 F.3d 443 (8th Cir. 1996):

> "Although we have not previously ruled on the precise question of whether medical malpractice judgments are dischargeable in bankruptcy, we have held that conduct that is merely reckless is not malicious within the meaning of the statute. See *Cassidy v. Minihan*, 794 F.2d 340, 344 (8th Cir.1986); *In re Long*, 774 F.2d 875, 880-81 (8th Cir. 1985). We have expressed the belief that Congress intended "to allow discharge of liability for injuries unless the debtor intentionally inflicted an injury." *Cassidy*, 794 F.2d at 344. As a result, we found that a judgment for injuries caused by the debtor's drunk driving was dischargeable because the debtor was, at most, guilty of reckless conduct." App, *infra*, A-25.

A Petition for Rehearing *En Banc* before the Eighth Circuit Court was granted, thus vacating the panel decision. On rehearing *en banc*, the Eighth Circuit agreed with the panel's decision. The Circuit Court argued that a claim cannot be excepted from discharge under §523(a)(6) unless the debtor actually intended to cause the harm in question. The Circuit Court held that "for a judgment debt to be non-dischargeable under the relevant statute provision, it is necessary that it be based on an intentional tort. App., *infra*, A-34. The Circuit Court further defined "intentional tort" as a "legal category that is based on the consequences of an act rather than the act itself." App., *infra*, A-34, citing Restatement (Second) of Torts 8A, comment a, at 15 (1965). Because Petitioner acknowledges that Respondent did not intend to cause Petitioner to lose her leg, Petitioner's claim failed under that standard. Accordingly, the Court allowed Petitioner's judgment to be discharged. App., *infra*, A-37.

The Circuit Court specifically acknowledged that its decision conflicted with decisions of other courts, noting that "We are aware that other Circuit Courts have reached legal conclusions that are at odds with our holding on this case. *See*, e.g., *Perkins v. Scharffe*, 817 F.2d at 394, and *In re Franklin*, 726 F.2d 606, 610 (10th Cir. 1984)." App., *infra*, A-36.[2] It concluded, however, that its approach was preferable because the other circuits

[2] The difficulty which courts have had in interpreting §523(a)(6) is illustrated by *In Re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987); *and aff'd* 100 B.R. 477 (W.D. Mo. 1988); *reversed* 869 F.2d 394 (8th Cir.), *aff'd. on reh'g. en banc*, 874 F.2d 1254 (8th Cir.1989); where on rehearing *en banc* the Circuit Court let stand the ruling of the District and Bankruptcy Courts excepting a judgment from discharge by a highly unusual, evenly divided vote of the Circuit Judges.

had paid insufficient attention to the legislative history of the relevant statute provisions.[3]

[3] The Circuit Court's decision may also be in conflict with the decision of this Court in *Tinker v. Colwell*, 24 S.Ct. 505, 193 U.S. 473, 48 L.Ed. 754 (1904), which was decided under the Bankruptcy Act of 1898 and which decision was, according to some authorities, overruled by the passage of the Bankruptcy Reform Act of 1978 . The majority and dissent in the instant case disagreed on this issue. Geiger *en banc*, App., *infra*., A-32 (majority opinion); Geiger *en banc* App., *infra*., A-43 (dissenting opinion). The other circuit courts of appeal in their opinions cited herein disagree as to whether the passage of the Bankruptcy Reform Act of 1978 overruled *Tinker*.

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF OTHER UNITED STATES CIRCUIT COURTS OF APPEAL AND IS CONTRARY TO AN EXISTING DECISION OF THE UNITED STATES SUPREME COURT.

I. Two Other Courts of Appeals Faced With Attempts By Patients To Except Medical Malpractice Claims From Discharge in Bankruptcy Have Rejected The Intent Requirement Adopted by The Court Of Appeals in This Case.

The analysis of the Court of Appeals cannot be reconciled with the analysis of the Tenth Circuit *in In re Franklin*, 726 F.2d 606 (10th Cir. 1984). That case involved a doctor who had prescribed anesthesia without taking a medical history. The patient suffered a heart attack and severe brain damage caused by medical malpractice of a Chapter 7 debtor-physician. The Tenth Circuit acknowledged that the debtor-physician did not intend to cause the injury, but did intend the actions that caused the injury. The Tenth Circuit noted that the Bankruptcy Court found that the physician's actions amounted to a "willful disregard of what he knew to be his duty" and a "complete and total disregard of acceptable medical practice.[4] Id. at 611. The Tenth Circuit affirmed the exception to discharge and held that:

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[4] Circuit Judge Murphy in her dissent in the instant case notes that Franklin was decided under the provision of the Bankruptcy Act of 1898 that was the predecessor to §523(a)(6) of the current Bankruptcy Code. App. A-47. Subsequent Tenth Circuit decisions under the Code, however, have maintained the standard set forth in *Franklin*. *See*, e.g., *In Re Pasek*, 983 F.2d 1524, 1527 (10th Cir. 1993) ("A willful and malicious injury occurs when the debtor, without justification or excuse, and with full knowledge of the specific consequences of his conduct, acts notwithstanding, knowing full well that his conduct will cause particularized injury.").

> By finding that this testimony is insufficient to contradict evidence of willful and wanton conduct, this Court does not intend to imply that Appellant performed the surgery in an effort to bring about the cardiac arrest which caused such drastic injury to Sanchez. However, there is little doubt that Appellant intended the acts that he did perform, which acts performed in the manner and the conditions present in this particular situation, necessarily resulted in the injury. This is sufficient to support a finding of willful and malicious conduct.

In re Franklin, 726 F.2d at 610.

The Sixth Circuit has followed the Tenth Circuit's approach in another malpractice-discharge case, *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir. 1987). In *Perkins*, the Sixth Circuit was faced with a situation where the debtor, a podiatrist, provided medical treatment which was characterized as "appalling." *Perkins*, 817 F.2d at 392. The debtor unnecessarily injected plaintiff's foot with an unsterilized needle, ignored the test results which indicated the appropriate drug treatment, and failed to hospitalize the plaintiff. Relying on the Tenth Circuit opinion in *Franklin*, the Sixth Circuit in *Perkins* excepted the judgment from discharge:

> We find that the facts in the case before us are very similar to the facts before the court in *Franklin* and we therefore reach the same conclusion as did the court in that case. Our opinion is reinforced by the leading bankruptcy treatise, which states:
>
> > In order to fall within the exception of Section 523(a)(6), the injury to an entity or property must have been willful and malicious. An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite, or ill will. The word "willful" means "deliberate

> or intentional," a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury." Collier on Bankruptcy §523.16 (15th Ed. 1991).

Perkins v. Scharffe, 817 F.2d at 394.

Because Respondent plainly intended the acts that were held to constitute malpractice, Petitioner's case would have succeeded under the *Franklin* and *Perkins* analysis followed by the Sixth and Tenth Circuits. The Eighth Circuit did not disagree with the perception that those courts would have treated this case differently, but simply rejected the analysis of those courts as unsatisfactory.

II. The Decision Also is Inconsistent With The Decisions of Other Courts of Appeals in Non-Medical Malpractice Discharge Cases Under §523(a)(6).

The Court of Appeals' intent requirement also conflicts with the decisions in nonmedical malpractice discharge cases from the Second, Fourth, and Ninth Circuits.

For example, the Second Circuit's decision in *In Re Stelluti*, 94 F.3d 84 (1996), involved an allegedly innocent spouse who signed a check on request of her overbearing husband. Mr. Stelluti was the sole shareholder and officer of Crossroads Truck Center, Inc. Mrs. Stelluti was a mere bookkeeper. Both had guaranteed a floor plan for secured creditor Navistar. Through a series of transactions, the Stellutis withdrew $621,000 from the Crossroads operating account on which Navistar had a lien because it contained vehicle proceeds. Some of the cash ended up in personal accounts and some ended up in Crossroads' new accounts 60 miles away in New Jersey. Mrs. Stelluti testified in the adversary to except the debt from discharge that she knew the

money was the property of Crossroads and acknowledged that the transfers to a bank in New Jersey did seem "a little strange." Mrs. Stelluti claimed that when she asked Mr. Stelluti about the transfer, he got angry and told her that "everything would be all right." The Court concluded that she "was not aware that the funds belonged to Navistar," *id.* at 88, but reasoned, despite her lack of knowledge, that her deliberate intention to transfer the funds was enough to justify excepting the debt from discharge. *Id.*

The Fourth Circuit applied similar reasoning in *St. Paul Fire and Marine Insurance Co. v. Vaughn*, 779 F.2d 1003 (1985). That case arose from the Debtor's misappropriation of a government check. There was no specific evidence that he intended to harm anyone, but he presumably intended to benefit himself and his interests. The Fourth Circuit determined that it would "place a nearly impossible burden upon a creditor who wishes to show that a debtor intended to do him harm." 779 F.2d at 1010. Accordingly, the Court excepted the debt from discharge notwithstanding the lack of the specific intent to harm the creditor. *Id.*

Another similar decision is *In re Cecchini*, 780 F.2d 1440 (9th Cir. 1986). In *Cecchini*, the debtor was directly involved in the conversion of a hotel owner's funds. The Bankruptcy Appellate Panel for the Ninth Circuit concluded that in order to except an injury from discharge, a debtor must inflict an intentional injury. The Ninth Circuit reversed, holding that application of a "looser standard" was appropriate. Under this construction, the creditor would not be required to prove that the debtor acted with intent to injure.[5]

[5] To be sure, a later panel of the Ninth Circuit in *In Re Gergely*, 110 F.3d 1448 (9th Cir. 1997), held that the medical malpractice in the case before it was not "willful and malicious." That panel did not, however, question the general applicability of Cecchini; it simply concluded on the facts of that particular case that the malpractice in question was not willful and malicious.

All three of those cases, like this one, involved deliberate acts by a debtor that resulted in a serious, albeit unintended, harm to a creditor. In each case, the Court of Appeals excepted the resulting claim from discharge under §523(a)(6). Application of the analysis of those decisions to this case would result in reversal of the judgment of the Court of Appeals. Thus, although some courts of appeals have adopted analysis similar to that of the Court below[6] it is clear that the circuits disagree on the level of intent required for an injury to become willful and malicious for purposes of §523(a)(6).

CONCLUSION

A computerized search for the term 11 U.S.C. §523(a)(6) in bankruptcy cases reveals more than two thousand cases citing this statute since the passage of the Bankruptcy Reform Act of 1978. While some of these cases may be mere mentions, during the year ending December 31, 1995, more than 70 reported decisions by the various bankruptcy courts of the United States primarily involved §523(a)(6) issues. While there appear to be fewer reported cases in 1996, there is no reason to believe 1995 was an aberrational year. Clearly there were other adversary complaints filed involving §523(a)(6) which did not result in the published opinions. §523(a)(6) is one of the most frequently litigated sections of the Code as creditors seek to except their claims from discharge. The presence of a clear conflict in the circuits on the issue of what constitutes a willful and intentional injury in general, coupled with the ability of a debtor otherwise

[6] *See*, e.g., *In re Conte*, 33 F.3d 303 (3d Cir. 1994) (Legal malpractice consisting of intentional concealment of dismissal of medical malpractice case from client resulting in expiration of medical malpractice statute of limitation held *dischargeable*; *Matter of Delaney*, 97 F.3d 800 (5th Cir. 1996) (per curiam) (use of double barreled sawed off shotgun resulting in serious facial wound held *dischargeable*); *In re Walker*, 48 F.3d 1161 (11th Cir. 1995) (employer's failure to obtain worker's compensation insurance held *dischargeable*).

acting in good faith to elect jurisdictions in which he will file petitions for relief[7] cries out for a clear resolution by this Court.

Respectfully submitted,

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[7] Debtors may file for relief where they have lived for the longest period during the 180 days before filing. 28 U.S.C. §1408(a). A debtor otherwise acting in good faith could move and file in the new district and circuit 91 days later or even sooner if he had lived in multiple districts previously. It is worth noting that petitioner's complaint to except respondent's actions from discharge apparently would prevail under the *Cecchini* test applied in the Ninth Circuit, where respondent committed the tortious acts in question.

APPENDIX

APPENDIX A

UNITED STATES BANKRUPTCY COURT
E.D. MISSOURI
EASTERN DIVISION

Bankruptcy No. 89-0154
Adv. No. 89-0154

In re Paul W. GEIGER,
Debtor,

Margaret KAWAAUHAU & Solomon Kawaauhau,
Plaintiffs,

v.

Paul W. GEIGER,
Defendant.

MEMORANDUM OPINION

Aug. 23, 1994

DAVID P. McDONALD, Bankruptcy Judge

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334, 151, and 157 and Local Rule 29 of the United States District Court for the Eastern District of Missouri. This is a "core proceeding" pursuant to 28 U.S.C. § 157(b)(2)(I), which the Court may hear and determine.

PROCEDURAL BACKGROUND

On March 16, 1989, Dr. Paul W. Geiger filed his voluntary petition seeking protection under Chapter 7 of the Bankruptcy Code. Plaintiffs, Margaret and Solomon Kawaauhau, filed this adversary complaint seeking to deny discharge of the debts Dr.

Geiger owed them as a result of a judgement they received in a state court malpractice suit. Plaintiffs assert that Dr. Geiger's conduct, which gave rise to their recoveries, was willful and malicious as those terms are used in section 523(a)(6) of the Bankruptcy Code.

FACTUAL BACKGROUND

Upon consideration of the testimony, record and argument of counsel the Court finds that:

Debtor, Dr. Paul Geiger, served as Mrs. Kawaauhau's physician for approximately five (5) years, from 1977 until 1983, during which time he treated her for a variety of ailments, including, diabetes, obesity, hypertension, chronic obstructive pulmonary disease and congestive heart failure. On or about January 4, 1983, Mrs. Kawaauhau sought medical attention from Dr. Geiger after dropping a box on her right foot. During her visit to Dr. Geiger's office, Mrs. Kawaauhau complained of chills, dizziness, pain in her right calf and having had a 102 degree fever the previous night. Her right leg experienced some jerking. Mrs. Kawaauhau's leg was swollen and red and pus oozed from beneath the nail of the large toe on her right foot.

Dr. Geiger diagnosed Mrs. Kawaauhau's condition as thrombophlebitis of the right leg, prescribed oral doses of Tetracycline in addition to standard thrombophlebitis treatment, and admitted her to the hospital. A blood analysis performed after her admission to the hospital displayed a "left shift" in her blood's composition. After her first day in the hospital, Mrs. Kawaauhau developed a blister on her right calf. On January 5, 1983, Dr. Geiger had hospital personnel sample and analyze both tissue from Mrs. Kawaauhau's large toe and fluid from the blister on her leg. The analysis of the blister fluid identified Gram, positive cocci bacteria in pairs. The culture made from Mrs. Kawaauhau's toe tissue suggested that Tetracycline was effective against the bacteria in her system. Dr. Geiger continued

to treat Mrs. Kawaauhau with Tetracycline administered orally, except that she was given one dose of Vigramycin (I.V. Tetracycline) intravenously.

On January 6, 1983, further tests revealed the presence of beta streptococcus bacteria in Mrs. Kawaauhau's system. Dr. Geiger continued to treat Mrs. Kawaauhau with Tetracycline administered orally. The tests were returned five days later.

On January 7, 1983, Dr. Geiger stopped treating Mrs. Kawaauhau with Tetracycline and prescribed Penicillin for her, to be administered orally. Dr. Geiger testified in a subsequent malpractice suit, in which he was the defendant, that he knew that Penicillin, administered intravenously, would have been more effective than oral Penicillin but that he prescribed oral Penicillin because Mrs. Kawaauhau had previously conveyed to him her desire to minimize the cost of her treatment (FN1) and he believed she was absorbing medicine through her stomach well.

Debtor left Mrs. Kawaauhau in the care of other doctors when he went away on business on January 8, 1983. These doctors treated Mrs. Kawaauhau with Moxam and Penicillin, administered intramuscularly, and, because her condition had continued to deteriorate, arranged to fly her to Honolulu where she could receive care from an infectious disease specialist. Upon his return on January 11, 1983, Dr. Geiger canceled Mrs. Kawaauhau's transfer to Honolulu because he thought she looked stronger and more alert than when he left her days earlier. Also on January 11, 1983, Dr. Geiger discontinued giving Mrs. Kawaauhau all antibiotics. Dr. Geiger based this decision on the grounds that:

(a) Mrs. Kawaauhau's blood was very thin (coagulating very slowly) and that antibiotics have a tendency to thin one's blood;

(b) He thought the infection in Mrs. Kawaauhau's leg had burned itself out;

(c) a culture of the leg suggested that there was no strep bacteria left in the leg; and

(d) the Doctor was concerned with the possibility of Mrs. Kawaauhau developing a superinfection.

Mrs. Kawaauhau did not receive any antibiotics for two days and on January 14, 1983 after further deterioration in the condition of her leg, and consultation with surgeons, the decision was made to amputate Mrs. Kawaauhau's leg below the knee.

Mrs. Kawaauhau and her husband Solomon sued Dr. Geiger in the Circuit Court for the Third Circuit of Hawaii for medical malpractice based on his treatment of Mrs. Kawaauhau's right leg. The Kawaauhaus presented the expert testimony of Dr. Peter Halford, a board certified surgeon, at that trial. Dr. Halford testified that Dr. Geiger had failed to provide adequate care in his treatment of Mrs. Kawaauhau's leg when he:

(a) failed to diagnose Mrs. Kawaauhau's condition as an infection by the second day of hospitalization;

(b) administered Tetracycline to Mrs. Kawaauhau because it is not a very effective antibiotic and poses a risk to people like Mrs. Kawaauhau who have kidney problems;

(c) failed to administer Penicillin on January 5, 1983, the day the lab identified the bacteria in Mrs. Kawaauhau (the expert testimony indicated that Tetracycline, unlike Penicillin, is not effective against the type of bacteria the lab identified);

(d) prescribed oral doses of Penicillin rather than intravenous Penicillin (which expert testimony indicated would have been more effective);

(e) discontinued administering antibiotics to Mrs. Kawaauhau on January 11, 1983; and

(f) canceled Mrs. Kawaauhau's transfer to Honolulu.

Dr. Geiger testified in his own defense and acknowledged that he recognized that, from January 7 to the morning of January 12, the standard of care for Mrs. Kawaauhau was penicillin by intravenous route for her streptococcus infection. He said such treatment was the best, "... but sometimes we're not permitted to give the best." He insisted that Mrs. Kawaauhau complained that medical expenses were too high and she wanted to keep the cost down. Based on her statements he used oral penicillin, which cost $4.00 per day, in contrast with intravenous penicillin that costs $40.00 per day.

Prior to the state court trial, Dr. Halford reviewed Dr. Geiger's treatment of Mrs. Kawaauhau and prepared a report of his review. At trial Dr. Halford testified that, in his report, he had concluded that, "I feel that this patient could have been and should have been managed differently, and her outcome would have been drastically different."

In preparation for the instant adversary complaint Dr. Peter Halford gave the following testimony in his deposition:

Q. What is the first area of mismanagement that you noticed with respect to Dr. Geiger's care of Mrs. Kawaauhau?

A. The first area involved the misdiagnosing this as a phlebitis rather than an infectious process when she had very obvious signs of infection, namely, pus from the toenail, redness, swelling, fever and a high white count.

Q. What's the next area of substandard or mismanagement that you noticed in her care?

A. The next problem was that of the wrong antibiotics being utilized for treatment of her infection. He utilized Tetracycline, which is not proper for the type of infection that she had, especially with her having underlying diabetes, hypertension and obesity.

* * * * *

Q. Eventually did Dr. Geiger administer penicillin to her?

A. That was the third problem with this case, was that he eventually did pick penicillin. It was however, some four days after he should have started penicillin and he gave it by the wrong route, primarily--I mean he gave it by the wrong route, meaning he gave it by mouth instead of by vein, and the blood levels just cannot be reached properly by mouth that you need to address this type of life-threatening infection.

Q. What do you mean by blood levels? Can you explain to us the effectiveness of oral penicillin versus intravenous?

A. By blood level I mean the amount of antibiotic that reaches the blood and in turn gets delivered to the area where the infection is proceeding. You need to get that high level of penicillin chemical into the bloodstream. And to give it by mouth means it has to go through the digestion process and get absorbed by the stomach, and even the best of oral doses won't reach as high a level as you need--as you can get by giving it intravenously directly into the bloodstream.

* * * * *

A. I think that cost certainly plays a role in what we choose if you have an alternative that is more economically feasible, but cost should have no role in directing your therapeutic efforts when you are dealing with life and death. And to me that was a gross error that was made by being concerned about several hundred dollars versus the loss of limb and life.

* * * * *

A. A fourth area of concern was that he actually stopped all intravenous antibiotics that were being administered to her on January 12th, I believe.

* * * * *

A. The significance, I believe, is that it reveals that Dr. Geiger knew, in fact, that intravenous penicillin was the appropriate standard of care for this type of problem and yet he intentionally used something that was less effective for the sake of cost. (FN2)

Q. (By Mr. Roehrig): Doctor, what's the necessary result of the intention of administering of substandard care under these circumstances?

A. The result is that the infection will progress at a much more rapid rate and more viciously than otherwise.

Q. In this particular case what did that result in in regards to injury to Mrs. Kawaauhau?

A. It resulted in her requiring amputation to save her life and in permanent kidney damage.

On March 25, 1987 a jury found Dr. Geiger guilty of medical malpractice and a judgment was entered in the Circuit Court of the Third Circuit, State of Hawaii in favor of the Plaintiff Margaret Kawaauhau and against Paul W. Geiger as follows: special damages, $203,040.00; general damages, $99,000.00. Judgment was also entered in favor of Plaintiff Solomon Kawaauhau and against Paul W. Geiger as follows: general damages for the loss of consortium, $18,000.00; emotional distress, $35,000.00. The total judgment entered in favor of the Plaintiffs and against Dr. Geiger was $355,040.00.

Dr. Geiger moved to Saint Louis and on March 16, 1989, filed a petition for protection under Chapter 7 of the Bankruptcy Code. Dr. Geiger's only substantial debts are those he owes the Kawaauhaus.

DISCUSSION

This case requires the Court to interpret and apply section 523(a)(6) of the Bankruptcy Code. Section 523(a)(6) denies a

debtor the discharge of any debt "for willful and malicious injury by the debtor to another entity ..." 11 U.S.C. § 523(a)(6) (1989). Courts that have considered this exception to discharge have disagreed on its meaning. As one authority summarized the situation, courts have split "as to whether the statute requires an intentional act that results in injury (FN3) or an act with intent to cause injury." (FN4) *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir. 1987).

The Eighth Circuit considered the meaning of "willful and malicious" as the term is used in section 523(a)(6) in *In re Long*, 774 F.2d 875 (8th Cir. 1985). *In re Long* involved a debtor who intentionally violated the terms of a security agreement by using the proceeds of certain accounts receivable, in which a creditor held a security interest, to fund an unsuccessful reorganization rather than depositing them in a collateral account as the security agreement required. *Id.* at 876. In other words, the *Long* debtor acted intentionally in misusing the proceeds but in so acting he did not intend to harm his creditor. The creditor who held the security agreement brought an adversary proceeding asking the court to deny discharge of the debt owed to it on the ground that the debtor willfully and maliciously injured the creditor by acting contrary to the security agreement.

The Circuit Court observed that "malice and willfulness are two different characteristics." *Id.*, at 880-81. In order to give meaning- to malice, independent of willful, the Court determined that "only conduct more culpable than that which is in reckless disregard of the rights of creditors' economic interests and expectancies" triggers § 523(a)(6)'s exception to discharge. *Id.* at 881. Seeking to articulate a "workable standard" for denying discharge under section 523(a)(6), the Court looked for guidance to the Restatement (Second) of Torts § 8A, Comment b, which qualifies its definition of intentional harm with a requirement that the expected harm be "certain or substantially certain to occur." (FN5) *Id.* The Eighth Circuit held that, in the

context of breached security agreements, dischargeability under section 523(a)(6) turns upon "whether the conduct is (1) headstrong and knowing (willful) and, (2) targeted at the creditor (malicious), at least in the sense that it is certain or almost certain to cause financial harm." *Id.* at 881.

Applying its stated "working standard", the Circuit Court found that Long had willfully and flagrantly breached the contract he had with his secured creditor. However, because Long had testified that his actions were designed to save his company and not to harm his secured creditor, the Circuit declined to find error in the lower courts' determinations that Long had not acted maliciously, as that term is used in section 523(a)(6). 774 F.2d at 882.

The Eighth Circuit considered dischargeability under section 523(a)(6) in the context of a personal injury debt in *In re Hartley*, 874 F.2d 1254 (8th Cir. 1989). (en banc). The personal injury debt in that case arose when Hartley, the owner of a tire service and auto parts shop, told an employee to clean and paint old tires with gasoline and tire black. *In re Hartley*, 75 B.R. 165, 166 (Bankr.W.D.Mo. 1987), *aff'd 100* B.R. 477 (W.D.Mo. 1988), *and rev'd* 869 F.2d 394 (8th Cir. 1989) *and rev'd on reh'g* 874 F.2d 1254 (8th Cir. 1989) (en banc). The employee, pursuant to Hartley's instructions, went to the basement of the shop and began treating the tires. 75 B.R. at 166. Hartley, as a practical joke, threw a firecracker into the basement where his employee was working. *Id.* Fumes had collected in the poorly ventilated basement and the firecracker caused an explosion which severely injured the employee. *Id.*. The employee brought a personal injury suit against Hartley in state court and Hartley filed bankruptcy shortly thereafter. (FN6) *Id.* The employee/plaintiff objected to the discharge of any liability Hartley owed him and the Bankruptcy Court held the employee's claim to be nondischargeable under § 523(a)(6). *Id.*

The Bankruptcy Court, in its *Hartley* decision, noted that the defendant:

> knew of the possible consequences, the present dangers, and the potential hazards of his acts. His only excuse was that he did not intend for the gasoline to explode or to burn the plaintiff. Such sanguine hopes and lack of appreciation for the almost inevitable results of his deliberate act cannot avoid the malicious requisite so displayed.

In re Hartley, 75 B.R. at 166 (emphasis added). The District Court affirmed the Bankruptcy Court's decision.

A panel of the Circuit Court reversed the District Court, holding that as the statute [11 U.S.C. § 523(a)(6)] was written by Congress, it is the injury to the creditor which must have been intentional--not the action of the debtor which caused the accident." 869 F.2d at 395. The Eighth Circuit reheard the case en banc and an equally divided court affirmed the decision of the District Court.

After the *Hartley* decision, courts in the Eighth Circuit faced with applying section 523(a)(6) seem to have two interpretations of "willful and malicious" to choose from; one requiring a specific intent to injure the creditor, to be applied to liabilities arising in the context of security agreements and, one requiring a less specific intent to be used in the context of personal injury liabilities. A debt which flows from a medical malpractice action does not fit squarely within either category.

Though courts in the Eighth Circuit have yet to address the dischargeability of a debt arising from medical malpractice, other courts have confronted this issue. *Perkins*, 817 F.2d 392 (6th Cir. 1987), *In re Strybel*, 105 B.R. 22 (9th Cir. BAP 1989), *In re Cole*, 136 B.R. 453 (Bankr.N.D.Tex.1992).

The Bankruptcy Court for the Northern District of Texas recently applied § 523(a)(6) to deny the discharge of a debt

representing a medical malpractice judgement against a debtor. *In re Cole*, 136 B.R. 453 (Bankr.N.D.Tex.1992). The *Cole* court applying the Fifth Circuit's interpretation of § 523(a)(6), found that Dr. Cole's erroneous removal of a nerve from a patient's hand during a ligament reconstruction operation constituted "a wrongful act done intentionally, which necessarily produce[d] harm and [wa]s without just cause or excuse," and concluded that section 523(a)(6)'s willful and malicious criteria had been satisfied. *Id.* at 457. Among the facts the *Cole* court found were:

> (1) Dr. Cole misrepresented that he had performed ligament reconstruction surgery many times before;
>
> (2) Dr. Cole failed to inform his patient that he had severed another patient's nerve while attempting the same procedure;
>
> (3) Debtor concealed the fact that Enid Memorial Hospital had revoked his staff privileges;
>
> (4) Dr. Cole, contrary to the testimony of three other doctors, stated that the medial nerve and tendon are five millimeters apart;
>
> (5) After the operation, Dr. Cole altered his pre-surgery notes to suggest that the patient had a nerve problem in his hand before the operation;
>
> (6) Three doctors testified Dr. Cole provided treatment which was below the standard in the community and that debtor was grossly negligent in treating the patient;
>
> (7) Debtor knew it was his duty to distinguish the patient's nerve from his tendon.

Finally, the *Cole* court concluded the "Debtor's conduct amounted to a willful disregard of that which he knew to be his duty and a total disregard of acceptable medical practice thereby constituting 'willful and malicious' conduct under § 523(a)(6)." *Id.* at 459.

The Sixth Circuit has applied Section 523(a)(6) to a debt which arose from a consent judgement in a medical malpractice case. *Perkins*, 817 F.2d 392 (6th Cir. 1987). In the *Perkins* case the debtor, a podiatrist, unnecessarily injected a patient's foot with an unsterile needle, causing the foot to become infected. The debtor also mistreated the infected foot in that: he failed to perform the proper tests when signs of infection appeared, he did not prescribe the drug of choice following a laboratory analysis, and he failed to hospitalize the patient. *In re Perkins*, 40 B.R. 942 (Bankr.E.D.Mich.1984). The patient brought a medical malpractice suit against Dr. Perkins. Dr. Perkins then filed a Petition under Chapter 7 of the Bankruptcy Code. The parties ultimately negotiated a consent judgement which reserved the question of dischargeability for the bankruptcy court. The Sixth Circuit held that Dr. Perkins's debt represented by the consent judgement was nondischargeable under § 523(a)(6). The Sixth Circuit reasoned that Debtors' conduct "amounted to a willful disregard of his duty and a complete and total disregard of acceptable medical practice and, therefore, constituted willful and malicious conduct." 817 F.2d at 394.

A third court, the Ninth Circuit Bankruptcy Appellate Panel, has applied section 523(a)(6) to a debt that arose in a medical malpractice context. *In re Strybel*, 105 B.R. 22 (9th Cir. BAP 1989). In that case, Dr. Strybel, a psychologist, treated a Mrs. Romano for depression over a period of approximately seven months. One night, Mrs. Romano called Dr. Strybel and visited his home. Dr. Strybel told Mrs. Romano that their doctor/ patient relationship would end if she decided to stay at his house. Mrs. Romano resided at Dr. Strybel's home for the next five weeks during which time Dr. Strybel and Mrs. Romano had sexual intercourse. After Mrs. Romano moved in with Dr. Strybel, her psychotherapy sessions with him ceased. Mrs. Romano ultimately left Dr. Strybel and returned to her husband. The Romanos wrote to Dr. Strybel and demanded $600,000.00 in damages from the doctor for his conduct with Mrs. Romano. The Romanos

later agreed to release Dr. Strybel from all liability in exchange for $350,000.00; $100,000.00 to be paid in cash and $250,000.00 to be paid through an unsecured promissory note. Dr. Strybel paid the Romanos the cash but defaulted on the note after making three payments and the Romanos obtained a state court judgement for the $172,000.00 balance. After Dr. Strybel filed for bankruptcy protection, the Romanos objected to the discharge of the debt owed to them claiming that section 523(a)(6) barred its discharge.

The Ninth Circuit's Bankruptcy Appellate Panel held, with little discussion, that Dr. Strybel's actions were not malicious so as to render his obligation under the promissory note nondischargeable under section 523(a)(6). *Id.* at 24. The panel distinguished *Perkins*, stating that Dr. Strybel's conduct "differed significantly" from the podiatrist's. *Id.* (FN7)

The *Cole*, *Perkins* and *Strybel* decisions convince this court that section 523(a)(6) bars the discharge of the debts Dr. Geiger owes to the Kawaauhaus. Far from standing for the proposition that section 523(a)(6) bars the discharge of all debts based upon a debtor's medical malpractice, those cases equate section 523(a)(6)'s malicious component with egregious behavior, utter incompetence or a total disregard for medical standards. Here, Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes.

Dr. Halford cited not one, but five decisions Dr. Geiger made during the course of his treating Mrs. Kawaauhau which, in his opinion, constituted substandard care. Some of the errors Dr. Geiger made, like his initial misdiagnosis of Mrs. Kawaauhau's condition, do not seem to have been uncorrectable and, in that sense, not too serious a deviation from medical norms. Other decisions Dr. Geiger made while treating Mrs. Kawaauhau, for example, administering Penicillin orally because that mode of

delivery costs less than intravenous delivery despite the possible consequences of not delivering enough medicine to the injured area, offends even a person lacking formal medical training. In fact, Dr. Geiger admitted at the state court trial that he knew that intravenous Penicillin was the proper prescription for Mrs. Kawaauhau but he opted for the less costly treatment of orally administered Penicillin.

Dr. Halford also stated that Dr. Geiger's decisions: to treat Mrs. Kawaauhau with Tetracycline, to not prescribe Penicillin for Mrs. Kawaauhau after receiving the laboratory analysis of the bacteria in her leg, and to discontinue treating Mrs. Kawaauhau with antibiotics on January 7, 1983 were decisions that caused Mrs. Kawaauhau to receive substandard care. The Court finds that the repeated errors Dr. Geiger made in treating Mrs. Kawaauhau evidence the same "disregard of acceptable medical practice" with which the debtors in *Cole* and *Perkins* acted. Dr. Geiger's egregious errors of judgement led to the worsening of Mrs. Kawaauhau's condition and to the eventual amputation of part of her leg. The damage, awards based upon the state court malpractice action against Dr. Geiger are, therefore, nondischargeable under section 523(a)(6). (FN8)

An Order consistent with this Memorandum Opinion will be entered this date.

ORDER

For the reasons stated in the Memorandum Opinion issued this date, IT IS ORDERED that:

1. the debt Dr. Geiger owes to Margaret Kawaauhau based on a judgement issued from the Circuit Court of the Third Circuit, State of Hawaii as follows: special damages, $203,040.00; general damages; $99,000.00 IS NONDISCHARGEABLE; and

2. the debt Dr. Geiger owes to Solomon Kawaauhau based on a judgement issued from the Circuit Court of the Third Circuit,

State of Hawaii as follows: general damages for the loss of consortium, $18,000.00, emotional distress, $35,000.00 IS NONDISCHARGEABLE.

FN1. Mrs. Kawaauhau denied ever having discussed the cost of treatment with Dr. Geiger. Solomon Kawaauhau, Margaret's husband, testified that he never told Dr. Geiger to keep costs to a minimum in treating Margaret's leg.

FN2. He defined substandard care as, "I mean that care rendered that particular patient was below the standard of care for the community in which that physician practices."

FN3. See *Perkins*, 817 F.2d 392 (6th Cir.1987); *In re Cecchini*, 780 F.2d 1440 (9th Cir.1986); *Matter of Quezada*, 718 F.2d 121 (5th Cir.1983) (holding that the court will infer the intent to harm or injure when the necessary result of a wrongful, deliberate act of the debtor causes injury).

FN4. See *In re Compos*, 768 F.2d 1155 (10th Cir. 1985) ("[s]ection 523(a)(6) does not except from discharge intentional acts which cause injury; it requires instead an intentional or deliberate injury." *Id.* at 1158. (cite omitted)).

FN5. Section 8A of the Restatement of Torts 2d defines "intent" as "denot[ing] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Comment b to that section adds "Intent is not, however limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

FN6. The Bankruptcy Court noted that:

(a) the estimated liability Hartley owed his employee constituted 97 % of all his listed obligations;

(b) the total of all debts, other than the potential debt Hartley owed his employee, was $30,648.16;

(c) Hartley and his wife took home roughly $2000.00 each month; and

(d) Hartley reaffirmed all his secured debts.

From these facts, the Bankruptcy Court concluded that the sole purpose for Hartley's filing was to eliminate the debt he owed to his employee.

FN7. The panel also distinguished Dr. Strybel's case from *In re Franklin*, 726 F.2d 606 (10th Cir.1984). *Franklin* involved a physician who incurred financial liability for medical malpractice when he prescribed anesthesia without investigating the patient's history, over-induced the patient with anesthesia and then tried to cover-up the records documenting his errors. In a later bankruptcy proceeding, Dr. Franklin's medical malpractice liability was held to be nondischargeable under section 17 of the Bankruptcy Act, which like section 523(a)(6) of the Code, referred to debts arising from the "willful and malicious" conduct of the debtor. The Tenth Circuit affirmed the decision of the Bankruptcy Court, finding the doctor's actions to be willful and malicious because he "intended the acts that he did perform, which acts performed in the manner and under the conditions present in this particular situation necessarily resulted in the injury." *Id.* at 610. The *Strybel* panel held that Dr. Strybel's acts were "simply not comparable to" the behavior of the physician in *Franklin*. 105 B.R. at 24. The Tenth Circuit has limited *Franklin's* holding to cases decided under the Bankruptcy Act. *In re Thurman*, 901 F.2d 839, 841 (10th Cir.1990).

FN8. The Tenth Circuit's *Franklin* decision, and its mechanical application of section 523(a)(6)'s predecessor leads to a

rule that any debt based upon medical malpractice is not dischargeable in bankruptcy. *In re Franklin*, 726 F.2d 606 (10th Cir. 1984). This Court does not, today, adopt, the idea that section 523(a)(6), *per se*, bars the discharge of debts based upon medical malpractice, instead, we hold that the Debtor's conduct in treating Mrs. Kawaauhau was so far below the accepted level of care that it constitutes willful and malicious conduct.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

U.S. Bankruptcy Case No.
89-41062-293

Chapter 7 Proceeding

Cause No. 4:94CV2047 JCH

IN RE:

PAUL W. GEIGER,
Debtor.

PAUL W. GEIGER,
Appellant,

v.

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,
Appellees.

MEMORANDUM AND ORDER

This matter is before the Court on the appeal of Debtor Paul W. Geiger from the Bankruptcy Court's Order that the debt owed to Margaret Kawaauhau and Solomon Kawaauhau is nondischargeable. Both parties have briefed the issues, and the Court finds that oral argument is not needed for disposition of the appeal. Bankr. R. 8012. On appellate review of a bankruptcy order, the District Court may not overturn factual findings unless they are clearly erroneous; conclusions of law are reviewed de novo. *United States v. Olson*, 4 F.3d 562, 564 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 636 (1993); Bankr. R. 8013.

Debtor filed his voluntary petition under Chapter 7 of the Bankruptcy Code on March 16, 1989. Appellees Margaret and Solomon Kawaauhau filed the complaint in the case below seeking to deny discharge of the debts Dr. Geiger owed them as a result of a state court malpractice judgment. The only significant debt of record is the debt from the state malpractice action that is the subject of this appeal.

Dr. Geiger treated Mrs. Kawaauhau from 1977 to 1983 for various problems. In January 1983, Mrs. Kawaauhau came to Debtor after dropping a box on her right foot. Her leg was swollen, and pus oozed from beneath the nail of her big toe.

Debtor diagnosed Mrs. Kawaauhau with Thrombophlebitis, rather than an infection, and admitted her to the hospital. The resulting numerous errors in Mrs. Kawaauhau's treatment led to a malpractice suit by Mr. and Mrs. Kawaauhau against Debtor. The Kawaauhaus won judgments against him totalling $355,040.00, which Debtor seeks to have discharged.

FACTS

The record reveals the following facts. After admitting Mrs. Kawaauhau to the hospital, Debtor prescribed oral doses of Tetracycline in addition to thrombophlebitis treatment. Blood tests performed after she was admitted showed a "left shift" in Mrs. Kawaauhau's blood. Her treatment was not changed. On her second day in the hospital, Mrs. Kawaauhau developed a blister on her right leg. On the same day, tests were run on fluid from her blister and the pus from her toe which showed the presence of Gram positive cocci bacteria in pairs. Debtor determined Tetracycline was effective against the bacteria from her toe and continued to prescribe Tetracycline orally.

The following day, January 6, 1983, additional tests determined that beta streptococcus bacteria were present in Mrs. Kawaauhau's system. No change was made in her treatment

until the next day, January 7, 1983, at which point Debtor took her off Tetracycline and began prescribing oral Penicillin. Debtor admitted in the subsequent malpractice suit that he knew oral Penicillin was less effective than intravenous Penicillin, but he prescribed oral Penicillin because Mrs. Kawaauhau wanted to minimize the cost of her treatment.

Debtor went on a business trip the following day, leaving Mrs. Kawaauhau's care to other physicians who treated her with intramuscular Moxam and Penicillin and arranged to fly her to an infectious disease specialist in Honolulu. Debtor returned January 11, 1983, canceled her transfer, and discontinued all antibiotics. Mrs. Kawaauhau did not receive any antibiotics for two days thereafter. Finally, on January 14, 1983, after Mrs. Kawaauhau's leg had deteriorated significantly, surgeons determined her leg needed to be amputated below the knee. Mrs. Kawaauhau subsequently lost her lower right leg to amputation.

Expert testimony of Dr. Peter Halford, a board certified surgeon, showed that Mrs. Kawaauhau received substandard care in the treatment of her leg. Dr. Halford's testimony identified at least six incidents of inadequate care. First, Debtor failed to properly diagnose Mrs. Kawaauhau's condition as an infection, even though pus oozed from her toe. Second, Debtor should not have administered Tetracycline to Mrs. Kawaauhau because it is not particularly effective against the type of infection she had, and it poses a risk to individuals who, like Mrs. Kawaauhau, have kidney problems. Third, Debtor failed to prescribe Penicillin when the bacteria was first identified: Penicillin is quite effective against such bacteria, and Tetracycline is not. Fourth, when Debtor did begin prescribing Penicillin he should have administered it intravenously rather than orally. Fifth, Debtor discontinued all antibiotics on January 11, 1983. Finally, Debtor canceled Mrs. Kawaauhau's transfer to Honolulu.

Dr. Halford's deposition testimony, admitted without objection as evidence in the case below, indicated that Penicillin was

proper for the type of infection Mrs. Kawaauhau had and that Tetracycline was not. His deposition testimony further indicated that by giving Penicillin orally rather than intravenously, the level of Penicillin in the blood could not reach the level required to address Mrs. Kawaauhau's life-threatening infection. Dr. Halford further indicated in his deposition that because Mrs. Kawaauhau was provided with substandard care, the infection progressed at a much more rapid rate and more viciously than it otherwise would have, resulting in amputation of her lower right leg.

ANALYSIS

In determining whether the debt to Appellees is dischargeable the Bankruptcy Court determined pursuant to 11 U.S.C. § 523(a)(6) that Debtor willfully and maliciously injured the Appellees. Appellant argues that the Bankruptcy Court used the wrong legal standard. The Bankruptcy Judge applied the standards set out in *In re Long*, as they were set forth in a personal injury case, *In re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987), *aff'd* 100 B.R. 477 (W.D. Mo. 1988), *rev'd* 869 F.2d 394 (8th Cir. 1989), *rev'd on reh'g* 874 F.2d 1254 (8th Cir. 1989) (en banc).

The Eighth Circuit does not appear to have ruled on the dischargeability of medical malpractice judgments under Chapter 7 of the Bankruptcy Code. It has, however, set out a test for applying the willful and malicious standard of the statute. *See In re Long*, 774 F.2d 875 (8th Cir. 1985) (holding debtor who intentionally violated the terms of a security agreement did not intend to harm his creditor). "When transfers in breach of security agreements are in issue, we believe nondischargeability turns on whether the conduct is (1) headstrong and knowing ('willful') and, (2) targeted at the creditor ('malicious'), at least in the sense that the conduct is certain or almost certain to cause financial harm." *Id.* at 881.

Extrapolating that test to the instant case, this Court looks at whether the debtor's actions were headstrong and knowing, and whether Debtor's conduct was intended to cause physical harm, or was certain or substantially certain to cause such harm. Debtor admitted that he knew he was providing Mrs. Kawaauhau with substandard care when he prescribed oral Penicillin, yet he did not provide the proper treatment. Debtor's admission satisfies the first part of the test--that his conduct was willful. Therefore, this Court is left with the malicious prong of the test. Appellees have made no showing that Debtor subjectively desired to injure Mrs. Kawaauhau. According to expert testimony, however, his conduct was certain or substantially certain to cause physical harm. Treating Mrs. Kawaauhau with oral Penicillin rather than intravenous Penicillin, caused the infection to spread more quickly and become more vicious, making amputation necessary to save her life.

CONCLUSION

Debtor knew his treatment was substandard, and his treatment was certain or substantially certain to cause Mrs. Kawaauhau harm. The Bankruptcy Court did not err in determining that the judgment against Debtor was not dischargeable.

The judgment of the Bankruptcy Court is affirmed.

Dated this 10th day of October, 1995.

/s/ Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 95-3913

In re Paul W. GEIGER,
Debtor.

Paul W. GEIGER,
Appellant,

v.

Margaret KAWAAUHAU and Solomon Kawaauhau,
Appellees.

Submitted June 13, 1996'
,Decided Aug. 14, 1996.
Rehearing En Banc Granted;
Opinion and Judgment Vacated Oct. 18, 1996.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Dr. Paul Geiger appeals the judgment of a district court affirming a bankruptcy court's order refusing to discharge his debt to Margaret and Solomon Kawaauhau. We reverse.

I.

The parties do not contest the relevant facts. Mrs. Kawaauhau sought treatment from Dr. Geiger after she injured her foot. Her leg was swollen and pus was discharging from beneath her big toe. Dr. Geiger admitted her to the hospital for treatment for thrombophlebitis and prescribed oral tetracycline. Dr. Geiger ran tests that suggested the presence of an infection, and concluded that continuing the tetracycline would be an effective treatment. He eventually prescribed oral penicillin in place of the tetracycline. (Dr. Geiger testified that he knew that intravenous

penicillin would have been more effective than the oral penicillin, but he prescribed oral penicillin because he understood that Mrs. Kawaauhau wanted to minimize the cost of her treatment.) Dr. Geiger then departed on a business trip and left Mrs. Kawaauhau in the care of other physicians, who began to administer intramuscular penicillin and decided to transfer her to an infectious disease specialist. When Dr. Geiger returned from his trip, however, he canceled the transfer and discontinued all antibiotics because he believed that the infection had run its course. A few days later Mrs. Kawaauhau's condition deteriorated and her leg had to be amputated.

When the Kawaauhaus won an action for malpractice against Dr. Geiger he petitioned for bankruptcy. The Kawaauhaus then filed a complaint requesting the bankruptcy court to deny discharge of the malpractice judgment on the ground that it was a debt "for willful and malicious injury by the debtor." 11 U.S.C. § 523(a)(6). In the bankruptcy court's view, willful and malicious conduct included egregious behavior, utter incompetence, or a total disregard for medical standards. The bankruptcy court credited the opinion of the Kawaauhaus' expert witness, who testified that Mrs. Kawaauhau had received substandard care in the treatment of her leg. In the expert's opinion, moreover, Dr. Geiger's treatment permitted the infection to progress more rapidly than it would have if she had received proper treatment. The bankruptcy court concluded that Dr. Geiger's treatment was so far below the standard level of care as to be willful and malicious, and therefore refused to discharge the malpractice judgment. The district court affirmed the bankruptcy court's decision.

II.

The parties express the belief that the outcome of this case ought to be influenced (indeed, might be controlled) by our holding in *In re Hartley*, 874 F.2d 1254 (8th Cir. 1989) (en banc).

But in *Hartley*, we simply left the result that the district court reached undisturbed because we were evenly divided on the merits of the appeal: We neither approved nor disapproved the district court's judgment, much less the reasoning that supported it. In other words, *Hartley* generated no precedent that would aid in the decision of the case before us.

Although we have not previously ruled on the precise question of whether medical malpractice judgments are dischargeable in bankruptcy, we have held that conduct that is merely reckless is not malicious within the meaning of the statute. *See Cassidy v. Minihan*, 794 F.2d 340, 344 (8th Cir.1986); *In re Long*, 774 F.2d 875, 880-81 (8th Cir. 1985). We have expressed the belief that Congress intended "to allow discharge of liability for injuries unless the debtor intentionally inflicted an injury." *Cassidy*, 794 F.2d at 344. As a result, we found that a judgment for injuries caused by the debtor's drunk driving was dischargeable because the debtor was, at most, guilty of reckless conduct. *Id.*

Although it is certainly true that the record supports the conclusion that Dr. Geiger's treatment of Mrs. Kawaauhau was at the very least negligent, the bankruptcy court erred when it concluded that his conduct was willful and malicious. We believe that on the record before us the worst thing that can be said about Dr. Geiger is that he acted recklessly in treating Mrs. Kawaauhau with relatively inexpensive antibiotics that were not as effective as more expensive ones, or in discontinuing antibiotics when he thought that the infection had run its course. The evidence showed only that Dr. Geiger failed to save Mrs. Kawaauhau's leg from the ravages of an infection, not that he intended to harm her. In other words, his efforts to treat Mrs. Kawaauhau were not calculated to result in the loss of her leg, and were therefore not malicious. The judgment debt is therefore properly dischargeable in bankruptcy.

III.

For the foregoing reasons, we reverse the judgment of the district court affirming judgment of the bankruptcy court.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

No. 95-3913

In re Paul W. GEIGER,
Debtor.

Paul W. GEIGER,
Appellant,

v.

Margaret KAWAAUHAU and Solomon Kawaauhau,
Appellees.

Submitted January 14, 1997
Decided May 14, 1997

Before ARNOLD, Chief Judge, and McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This case raises the question whether a judgment debt resulting from a medical malpractice action is dischargeable in bankruptcy. The Kawaauhaus maintain that it is not, because it is a "debt . . . for willful and malicious injury by the debtor," which 11 U.S.C. § 523(a)(6) exempts from discharge. The bankruptcy court agreed with the Kawaauhaus, see In re Geiger, 172 B.R. 916, and the district court affirmed that judgment in an unpublished opinion. On further appeal, a unanimous panel of this court reversed, relying on Cassidy v. Minihan, 794 F.2d 340 (8th Cir.1986). The panel observed that the worst that might even colorably be said of the debtor's behavior was that it was reckless, and that since there was no evidence that he intended to

harm his patient, it was not possible to say that his actions were either willful or malicious, much less both. See In re Geiger, 93 F.3d 443 (8th Cir.1996).

We granted the Kawaauhaus' subsequent suggestion for rehearing en banc, and we reverse the judgment of the district court.

I.

Mrs. Margaret Kawaauhau sought treatment from Dr. Paul Geiger after she injured her foot. He admitted her to the hospital for treatment for thrombophlebitis, ran tests that suggested the presence of an infection, and concluded that continuing the oral tetracycline that he had already prescribed would be an effective treatment for her condition. He eventually prescribed oral penicillin in place of the tetracycline. Dr. Geiger then departed on a business trip, leaving his patient in the care of other physicians, who began to administer intramuscular penicillin and decided to transfer her to an infectious disease specialist. When Dr. Geiger returned from his trip, however, he discontinued all antibiotics because he believed that the infection had run its course. A few days later, Mrs. Kawaauhau's condition deteriorated and her leg had to be amputated below the knee. When the Kawaauhaus succeeded in an action for malpractice against Dr. Geiger, he petitioned for bankruptcy.

In an effort to prove that the malpractice judgment was not a dischargeable debt, the Kawaauhaus introduced into evidence before the bankruptcy court certain portions of the transcript of the trial of the malpractice action. The transcript revealed that Dr. Geiger had admitted at trial that the proper treatment for the streptococcus infection with which he was faced was intravenous penicillin, that he knew that at the time, but that he had nevertheless administered the penicillin orally partly because his patient had frequently complained about medical expenses (he had been treating her for a number of years) and had specifically

expressed a desire to avoid costly medicines. In response to a direct question about whether he acknowledged that intravenous penicillin was "the proper standard of care in the circumstances," Dr. Geiger answered that he did.

The Kawaauhaus, without objection from Dr. Geiger, also introduced into evidence before the bankruptcy court the deposition of Dr. Peter Halford, a physician hired to examine both Mrs. Kawaauhau's medical records and Dr. Geiger's testimony in the original trial and to render expert opinions based on them. In his deposition, Dr. Halford first offered his opinion that Dr. Geiger's treatment of Mrs. Kawaauhau had been negligent in at least four particulars: He had initially misdiagnosed her condition as phlebitis, or inflammation of the veins in her leg, rather than as an infection; he had initially given her the wrong antibiotic (tetracycline instead of penicillin); he had started penicillin too late, and then had administered it by mouth rather than intravenously; and he had stopped administering all antibiotics for a time. But Dr. Halford agreed with counsel that Dr. Geiger's most egregious error was that he had considered the relative costs of administering oral and intravenous penicillin in deciding which treatment to choose. It is mainly on the foundation of this last exchange that the Kawaauhaus have erected their theory that Dr. Geiger acted willfully and maliciously, because, the argument runs, he intentionally rendered substandard care to Mrs. Kawaauhau, an act, the Kawaauhaus say, that necessarily led to her injury. "It is this intentional substandard treatment of the plaintiff," the Kawaauhaus said before the bankruptcy court, "in conjunction with the other misfeasance, that is the crux of our case."

Whether, in forming his opinion concerning the propriety of Dr. Geiger's treatment, Dr. Halford believed that Mrs. Kawaauhau had requested that Dr. Geiger cut costs, Dr. Halford did not say, and the bankruptcy court made no finding on the matter. Dr. Halford observed only that "cost certainly plays a role in what we

choose if we have an alternative that is more economically feasible, but cost should have no role in directing our therapeutic efforts when you are dealing with life and death." Dr. Halford then reviewed the portion of Dr. Geiger's trial testimony in which he admitted knowing, "in fact, that intravenous penicillin was the appropriate standard of care for this type of problem and yet he intentionally used something that was less effective for the sake of cost." Dr. Halford ended his deposition by agreeing with the Kawaauhaus' lawyer that "Dr. Geiger intentionally administered substandard care to Margaret Kawaauhau that necessarily resulted in advancing infection in her leg, then loss of her leg, and permanent damage to her kidneys."

The bankruptcy court, though it did not say so directly, evidently credited everything that Dr. Halford said in his deposition, and concluded that "Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the "standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." In re Geiger, 172 B.R. 916, 923 (Bankr.E.D.Mo.1994). The bankruptcy court further opined that in the context Dr. Geiger's consideration of costs "offends even a person lacking formal medical training." Id. In affirming the judgment of the bankruptcy court, the district court, relying on our opinion in In re Long, 774 P.2d 875 (8th Cir.1985), indicated its belief that Dr. Geiger's admission that "he knew he was providing Mrs. Kawaauhau with substandard care when he prescribed oral penicillin" rendered his conduct willful, and the fact that "his conduct was certain or substantially certain to cause physical harm" rendered it malicious within the meaning of the relevant provision of the bankruptcy code.

II.

We begin our consideration of this evidence by admitting to some uneasiness about the procedure employed in the bankruptcy court. The complaint before the bankruptcy court sought

to have a judgment debt declared nondischargeable because, in the words of the statute, it was a "debt ... for willful and malicious injury." See 11 U.S.C. § 523(a)(6). The relevant judgment was entered, and thus the debt was necessarily predicated on, a jury verdict that was in turn based on evidence presented at a trial. The parties did not furnish us with a copy of the trial transcript, and we are thus unable to know what testimony the jury heard that might have convinced it that Dr. Geiger had committed medical malpractice. We therefore find it hard to understand how we can decide what conduct the verdict, and thus the "debt," was "for" within the meaning of the statute. We wonder about the propriety of going behind the pleadings in the original malpractice action, which asked for damages for Dr. Geiger's negligence, to decide what this "debt" was "for." (Plaintiffs prayed for punitive damages, but the issue was not submitted to the jury.) Even if the trial transcript contained particularly shocking evidence of gross negligence and recklessness, or even of intent to injure, we would have no way of knowing what testimony the jury credited, what their verdict was supported by, and therefore what the "debt" under consideration was "for."

[1] Dr. Geiger, however, does not raise these difficulties on appeal, and we leave them to another day, because we are of the view that the evidence before the bankruptcy court, even when viewed in a light most favorable to the Kawaauhaus, cannot make this debt one that is "for willful and malicious injury by the debtor," as the statute requires. See 11 U.S.C. § 523(a)(6).

This phrase has a long history. It was part of the Bankruptcy Act as early as 1898, and in Tinker v. Colwell, 193 U.S. 473, 481, 490, 24 S.Ct. 505, 506- 07, 48 L.Ed. 754 (1904), Mr. Justice Peckham gave it an expansive reading, leading to a holding that a judgment based on a husband's complaint for criminal conversation (adultery) was not dischargeable. Despite the debtor's argument that in order to be malicious his action had to have evidenced ill will toward the husband, the Court held that it was

unnecessary under the statute for the debtor to have acted with "personal malevolence toward the husband." Id. at 485, 24 S.Ct. at 508. It was enough (that is, the statute was satisfied) if the debtor had committed " 'a wrongful act, done intentionally, without just cause or excuse.'" Id. at 486, 24 S.Ct. at 508, quoting Bromage v. Prosser, 4 Barn. & Cres. 247, 255, 107 Eng.Rep. 1051, 1054 (K.B.1825). In order for an act to be willful, it was, according to the Court, necessary only that it be intentional and voluntary. Tinker, 193 U.S. at 486, 24 S.Ct. at 508-09. The obstacle erected by the statutory exception to discharge was therefore not nearly so formidable for a judgment creditor as a first reading of it might have made it appear. All that the creditor had to show was that the debtor had intentionally committed a wrongful act that was unjustified and unexcused. (How a wrongful act could ever be anything but unjustified, the Court did not explain.)

When the bankruptcy code was revised in 1978, the words of the exception to discharge under consideration in this case remained unchanged, but both the United States Senate and the United States House of Representatives, in reenacting what is now 11 U.S.C. § 523(a)(6), observed in legislative reports that they intended the word "willful" to mean "deliberate or intentional," and stated specifically that to "the extent that Tinker v. Colwell ... held" that a "less strict" (Senate), or "looser" (House), "standard is intended ... [it is] overruled." See S.Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, and H.R.Rep. No. 95-595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963. Both houses of Congress also specifically stated that it was their intention to overturn any cases that had applied "a 'reckless disregard' standard" in deciding what debts were not dischargeable. Id. Not all of the cases that we have decided after the revision have focused very precisely on the exact meaning of this new appreciation of what debts the bankruptcy code protects from discharge. See, e.g., In re Long, 774 F.2d 875 (8th Cir. 1985). But in Cassidy v. Minihan, 794 F.2d 340, 344 (8th Cir.1986), our court, after a consideration of the legislative history of the revised act, held that Congress had intended to "allow discharge of liability for injuries unless the debtor intentionally inflicted an injury."

[2][3] The Sixth Circuit has put the question that is before us this way: Do the words "deliberate or intentional," contained in the legislative reports referred to above, require an "intentional act that results in injury" or "an act with intent to cause injury" before a judgment debt can be exempt from discharge? Perkins v. Scharffe, 817 F.2d 392, 393 (6th Cir.1987), cert. denied, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 112 (1987). Posed this way, we think that the question virtually answers itself. We do not hesitate to adopt the latter construction, because we believe that it is the more natural way to interpret the relevant words. For one thing, the word "intentional," by itself, will, almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts, a category that excludes injuries caused by acts that are merely negligent, grossly negligent, or even reckless. We presume that when Congress uses a word that has a fixed, technical meaning, it has used it as a term of art. Second, the word "wilful" in the statute (which Congress has said means "deliberate or intentional") modifies the word "injury," so that what is required for nondischargeability is a deliberate or intentional injury, not merely a deliberate or intentional act. We think it fair to conclude that this means a deliberate or intentional invasion of the legal rights of another, because the word "injury" usually connotes legal injury (injuria) in the technical sense, not simply harm to a person.

Adopting the alternative construction, moreover, would render virtually all tort judgments exempt from discharge. Every act that is not literally compelled by the physical act of another (as when someone seizes my arm and causes it to strike another), or the result of an involuntary muscle spasm, is a "deliberate or

intentional" one, and if it leads to injury, a judgment debt predicated on it would be immune from discharge under the alternative construction of the statute that is posed in Perkins. Indeed, we see no reason that a knowing breach of contract would not result in a judgment that would be exempt from discharge under this legal principle. Surely this proves too much. A person who deliberately and intentionally turns the wheel of an automobile to make a left-hand turn without looking up to see if traffic is coming the other way, an act very likely to lead to injury, however foolish or even reckless he or she may be, simply cannot fairly be described as committing an intentional tort.

[4] We therefore think that the correct rule is that a judgment debt cannot be exempt from discharge in bankruptcy unless it is based on what the law has for generations called an intentional tort, a legal category that is based on "the consequences of an act rather than the act itself." Restatement (Second) of Torts § 8A, comment a, at 15 (1965). Unless the actor "desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it," he or she has not committed an intentional tort. Id. § 8A at 15.

In our case, there is no suggestion whatever that Dr. Geiger desired to cause the very serious consequences that Mrs. Kawaauhau suffered. So much is conceded. If, therefore, he was an intentional tortfeasor as we have defined that term, he would have to have believed that Mrs. Kawaauhau was substantially certain to suffer harm as a result of his actions. Although the district court opined that "expert testimony" established that Dr. Geiger's conduct was "certain or substantially certain to cause physical harm," that is not enough. There is nothing in the record, so far as we can tell, that would support a finding that Dr. Geiger believed that it was substantially certain that his patient would suffer harm. Indeed, he testified that he believed that Mrs. Kawaauhau was absorbing the penicillin that she was taking orally well enough to effect a cure.

Dr. Halford, moreover, never testified, except in response to a very leading question, that the harm that "Mrs. Kawaauhau suffered was a substantially certain consequence of Dr. Geiger's course of treatment. What Dr. Halford said in the main portion of his testimony was that it was a necessary result of that treatment that the infection would "progress at a much more rapid rate and more viciously than otherwise." He also said that, in this case, the treatment "resulted in her requiring amputation to save her life and in permanent kidney damage," but he did not say that that was a necessary result of the treatment, only, as we understand the testimony, a result of the progress of the infection. We suspect that the course and consequences of an infection are notoriously difficult to predict, but even if Dr. Halford had testified that Dr. Geiger's treatment necessarily (that is, inevitably) led to Mrs. Kawaauhau's injuries, plaintiff's proof still falls short of the mark. As we have indicated, the real question is whether Dr. Geiger believed that these consequences were substantially certain to occur at the time that he attempted his treatment, and the record simply will not support the conclusion that he did. This is an important distinction, one in fact that defines the boundary between intentional and unintentional torts: Even if Dr. Geiger should have believed that his treatment was substantially certain to produce serious harmfill consequences, he would be guilty only of professional malpractice, not of an intentional tort.

In the case before us, as our original panel has already noted, "We believe that ... the worst thing that can be said about Dr. Geiger is that he acted recklessly in treating Mrs. Kawaauhau with relatively inexpensive antibiotics that were not as effective as more expensive ones, or in discontinuing antibiotics when he thought that the infection had run its course." In re Geiger, 93 F.3d 443, 444-45 (8th Cir.1996). It is true, as the district court noted, that Dr. Geiger acted deliberately and intentionally when he pursued this course of conduct, but only an elaborate play on words can transform this behavior into something that is willful

and malicious. It is also true that Dr. Geiger testified that he knew that intravenous penicillin was the standard treatment, but a deviation from a standard is not even always negligent, especially if, as may have been the case here, it was induced by the patient herself or Dr. Geiger reasonably believed that it was. Assuming, without deciding, that Mrs. Kawaauhau did urge Dr. Geiger to cut costs, it is perhaps true that he should have attempted to convince her that she was requesting a very foolish, indeed reckless, economy. We express no view on the duty of physicians in such circumstances, because it is unnecessary to a resolution of this case, and because the existence and scope of such a duty will usually be a matter governed by the established law of some state. Whatever the duty, a breach of it would amount only to a negligent failure to live up to professional standards.

We are aware that other circuit courts have reached legal conclusions that are at odds with our holding in this case. See, e.g., Perkins, 817 F.2d at 394, and In re Franklin, 726 F.2d 606, 610 (10th Cir.1984). We believe, however, with respect, that these decisions are not well grounded in the statute because they pay insufficient attention to the legislative history of the relevant statutory provisions. They do not, moreover, give appropriate weight to the well-established interpretational rule that exceptions from discharge are to be strictly construed so as to give maximum effect to the policy of the bankruptcy code to provide debtors with a "fresh start." See, e.g., In re Kline, 65 F.3d 749, 751 (8th Cir.1995), and Werner v. Hofmann, 5 F.3d 1170, 1172 (8th Cir.1993) (per curiam).

Finally, we observe that in this case we hold only that for a judgment debt to be nondischargeable under the relevant statutory provision, it is necessary that it be based on the commission of an intentional tort. We believe, as we have said, that the debtor's conduct cannot otherwise be said to be "willful." We express no view, however, on the question whether it is sufficient

for nondischargeability that the judgment be for an intentional tort. We note in this connection that 11 U.S.C. § 523(a)(6) requires that the injury be both "willful and malicious" before an entitlement to the exception to discharge arises. In In re Long, 774 P.2d at 881, we held that for a creditor to establish that the debtor acted maliciously, it was necessary to show that the debtor's conduct was "targeted at the creditor"; and, since the debtor in that case (though he was an intentional tortfeasor) was not acting with a purpose to harm creditors, we concluded that he was not acting maliciously, id. at 882. Since it is not necessary to a decision in this case that we decide the meaning of the word "malicious" and the bearing, if any, that the interpretation given to that word' might have on the dischargeability of a judgment debt," we have no occasion to discuss the matter, and thus" we venture no opinion on it.

III.

In sum, since it is not even alleged that Dr. Geiger intended to inflict an injury on his patient, and it cannot be said that he believed that an injury was substantially certain to result, the judgment underlying this case could not have given rise to a "debt ... for willful and malicious injury by the debtor," see 11 U.S.C. § 523(a)(6). We therefore reverse the judgment of the district court.

MURPHY, Circuit Judge, with whom McMILLIAN, Circuit Judge, joins, dissenting.

Because the court's reading of 11 U.S.C. § 523(a)(6) goes beyond the language of the statute and its interpretation by other circuit courts, and because it unnecessarily restricts this exception to dischargeability, I respectfully dissent.

Although the court states the question in this case to be whether a medical malpractice judgment debt is dischargeable in bankruptcy, it is more accurately stated to be whether the

particular judgment debt of Dr. Paul Geiger may be discharged. After a jury trial for medical malpractice in Hawaii, the Kawaauhaus obtained valid state judgments against Dr. Geiger in the total amount of $355,040. He left Hawaii and settled in St. Louis. When the Kawaauhaus attempted to collect their judgment in Missouri, Dr. Geiger filed for protection under Chapter 7 of the bankruptcy code. His only significant debt was the state court judgment awarded to the Kawaauhaus. After a hearing, the bankruptcy court found that under § 523(a)(6) Dr. Geiger's debt was not dischargeable because it qualified for exception as a willful and malicious injury. The district court affirmed, concluding that under In re Long, 774 F.2d 875 (8th Cir.1985), the debt was not dischargeable because Dr. Geiger knew his treatment was substandard and that it was certain or substantially certain to cause Mrs. Kawaauhau harm.

The court reverses because it concludes that Dr. Geiger's actions were not willful "even when [the evidence is] viewed in a light most favorable to the Kawaauhaus," but its recitation of the facts and its discussion of them does not reflect adherence to this principle.

The evidence before us comes from the record made in the bankruptcy court. At the bankruptcy court hearing the Kawaauhaus offered four exhibits which were accepted into evidence without objection. These exhibits consisted of evidence from the state trial (portions of the state trial transcript and a report prepared by the Kawaauhaus' expert witness, Dr. Peter Halford, a board certified surgeon), and evidence prepared for the bankruptcy hearing (a deposition and affidavit of Dr. Halford). Dr. Geiger testified at the hearing on his own behalf, but offered no other evidence.

The bankruptcy court made the following findings of facts. On or about January 4, 1983, Mrs. Kawaauhau sought medical treatment from Dr. Geiger. She had been a patient of his in the

past and had numerous medical conditions with which Dr. Geiger was familiar. In this particular instance, she had dropped a box on her right foot, her leg was swollen and red, and pus oozed from beneath the nail of her large toe. She complained of chills, dizziness, pain in the calf, and a fever of 102 degrees the prior evening. She also developed a blister on her right calf. After an initial diagnosis of thrombophlebitis, Dr. Geiger received test results on January 5 and 6 that indicated Mrs. Kawaauhau suffered from a bacterial infection. On January 7, he prescribed oral penicillin. After Dr. Geiger left town on January 8, the doctors who assumed care of Mrs. Kawaauhau immediately started her on intramuscular penicillin and arranged to transfer her to a specialist in Honolulu. When Dr. Geiger returned on January 11, he canceled the scheduled transfer because he thought Mrs. Kawaauhau looked stronger and more alert than when he left, and he also canceled all antibiotics because he thought her infection might be gone, she might develop a superinfection, and her blood was too thin. Her condition deteriorated, and on January 14 the decision was made to amputate her leg below the knee.

Based on his own testimony, the bankruptcy court found that Dr. Geiger knew the proper standard of care for treating an infection like Mrs. Kawaauhau's was intravenous penicillin rather than oral penicillin, and that he knew he was not administering care that met this standard. [FN1] The court also relied on the expert testimony of Dr. Halford that Dr. Geiger's intentional substandard care had caused Mrs. Kawaauhau's infection to progress more rapidly and viciously than it would have otherwise, and that this progression resulted in the amputation of her leg and permanent damage to her kidneys. Dr. Halford expressed the additional opinion that Dr. Geiger had "intentionally administered substandard care to Margaret Kawaauhau that necessarily resulted in advancing infection in her leg, then loss of her leg, and permanent damage to her kidneys. "

FN1. Dr. Geiger testified in the bankruptcy court that his patient's concern about cost prevented him from administering the proper standard of care. In the state trial, both Mr. and Mrs. Kawaauhau denied they expressed any concern about cost to Dr. Geiger, and this testimony was entered into the bankruptcy court record. Dr. Geiger stated twice at the hearing that he never explained to Mrs. Kawaauhau the cost difference between oral and intravenous penicillin. In response to continued questioning by his attorney, he later stated he did not know if he had discussed the cost difference. The bankruptcy court did not make any specific findings about the conflicting evidence on this point.

The court expresses some uncertainty about the proper procedure in a case such as this and whether the focus should be on the state court pleadings or evaluation of the evidence presented to the state jury. A survey of leading cases indicates that sometimes discharge exception issues are resolved by motions for summary judgment. [FN2] See, e.g., In re Zelis, 66 F.3d 205, 208 (9th Cir.1995); In re Walker, 48 F.3d 1161, 1163 (11th Cir.1995). Willfulness and maliciousness are typically resolved in a case such as this, however, after a hearing in the bankruptcy court which may involve additional evidence. See e.g., In re Stelluti, 94 F.3d 84 (2d Cir.1996) (bench trial on dischargeability); In re Stanley, 66 F.3d 664 (4th Cir.1995) (bankruptcy court hearing on whether actions leading to state court judgment were willful and malicious under § 523(a)(6)); In re Thirtyacre, 36 F.3d 697 (7th Cir. 1994) (evidentiary hearing to determine if actions were willful and malicious); In re Conte, 33 F.3d 303 (3d Cir. 1994) (remand for hearing on whether actions underlying state court verdict were willful and malicious under § 523(a)(6)); In re Pasek, 983 F.2d 1524 (10th Cir.1993) (bankruptcy court hearing on willful and malicious); In re Franklin, 615 F.2d 909, 911 (10th Cir. 1980) (bankruptcy court not limited to state court record in making dischargeability determination).

FN2. Some motions seek to bar by collateral estoppel the relitagation of factual and legal issues decided in state court. See Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 1, 112 L.Ed.2d 755 (1991) (collateral estoppel may apply to dischargeability proceedings under § 523(a)); In re Miera, 926 F.2d 741, 743 (8th Cir. 1991). (willful and malicious issue necessarily decided by state court award of punitive damages).

In this case, unlike Miera, the record does not reveal that the issue of whether Dr. Geiger inflicted a willful and malicious injury was decided in the state court action, and that issue is of course different from the issues of whether Dr. Geiger breached the standard of care he owed Mrs. Kawaauhau or caused her injury, both of which would have been essential to the state judgment. See Restatement (Second) of Torts § 328A (1965 and Supp.1996).

The parties here do not challenge the factual findings of the bankruptcy court or the admissibility of the evidence on which it relied. They view the question for this court to be whether the facts found by the bankruptcy court indicate that the injury caused by Dr. Geiger was willful and malicious and whether the judgments assessed against him for that injury is therefore dischargeable. The factual findings of the bankruptcy court are reviewed for clear error, and its legal conclusions are reviewed de novo. In re Central Arkansas Broadcasting Co., 68 F.3d 213, 214 (8th Cir. 1995) (per curiam). I believe a careful review shows that the bankruptcy court's findings are not clearly erroneous and that they are supported in the record.

The statutory provision controlling the question of discharge in this case, 11 U.S.C. § 523(a)(6), bars discharge in bankruptcy of any debt "for willful and malicious injury by the debtor...." If the intent of Congress is clear from the text of the statute, no further inquiry is necessary. Good Samaritan Hosp. v. Shalala,

508 U.S. 402, 409-11, 113 S.Ct. 2151, 2157,124 L.Ed.2d 368 (1993); Arkansas AFL-CIO v. F.C.C., 11 F.3d 1430, 1440 (8th Cir.1993) (en banc). The legislative history is consulted only if that intent cannot be discerned from the plain language. Arkansas AFL-CIO, 11 F.3d at 1440.

The court finds it unnecessary to decide the meaning of "malicious" because of its treatment of "willful." The statute does not define "willful," but when Congress uses a term of art, that term is accorded its established meaning. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342, 111 S.Ct. 807, 810-11, 112 L.Ed.2d 866 (1991). According to Prosser and Keeton, "[t]he usual meaning assigned to 'willful' .... is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow ... W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 34, at 213 (5th ed. 1984). Although the meaning of "willful" can be influenced by its context, in civil actions the word is commonly used for an act which is intentional, knowing, or voluntary, as distinguished from accidental. Screws v. United States, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495 (1945); United States v. Murdock, 290 U.S. 389, 394, 54 S.Ct. 223, 225, 78 L.Ed. 381(1933). Only when used in a criminal context does it generally mean an act done with bad purpose. Screws, 325 U.S. at 101, 65 S.Ct. at 1035; Murdock, 290 U.S. at 394, 54 S.Ct. at 225.

The Supreme Court has had only one occasion to discuss the meaning of willful and malicious in the statutory section on exceptions to discharge and that was in Tinker v. Colwell, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904). In Tinker, the Court interpreted "willful and malicious" in this way:

> a wilful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception.

Id. at 487, 24 S.Ct. at 509. The Kawaauhaus argue that Tinker is still good law because it has never been overruled or modified by any subsequent Supreme Court case, but Dr. Geiger argues that the legislative history of the new bankruptcy code shows Congress intended in it to override Tinker.

In the bankruptcy code enacted in 1978 Congress made no change in the wording of this exception to discharge, but the more than 700 pages of associated committee reports make brief reference to the meaning of § 523(a)(6) See S.Rep. No. 95-989, at 79 (1978), reprinted in, 1978 U.S.C.C.A.N. 5787, 5865, and H.R.Rep. No. 95-595, at 365 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320-21. The reports comment:

> "[W]illful" means deliberate or intentional . To the extent that Tinker v. Colwell (citation omitted) held that a [looser (House version); less strict (Senate version)] standard is intended, and to the extent that other cases have relied on Tinker to apply a "reckless disregard" standard, they are overruled.

Id. This commentary reveals several things, but also raises additional questions. It indicates that "willful means deliberate or intentional" and that § 523(a)(6) calls for something more than reckless disregard. While it indicates some uncertainty as to what Tinker actually held, any reading of it to mean only reckless disregard is overruled. The commentary does not define a heightened standard, however, or how the words intentional and deliberate should be understood. [FN3]

> FN3. As the Third Circuit has noted:
>
> While this legislative history excludes recklessness [as a definition of "willful"], it does not state exactly what is

required. The bankruptcy courts that have decided this matter have been divided as to whether the statute requires an intentional act that results in injury or an act with intent to cause injury. (Citations and quotations omitted). Moreover, the meaning of either of these two interpretations is not self-evident.

In re Conte, 33 F.3d at 306.

This legislative history does not call for the interpretation adopted today by the court--that Congress intended "willful" to incorporate subjective specific intent to injure and to restrict the application of § 523(a)(6) to intentional torts. In reaching its conclusion, the court relies on the definition of intent found in the Restatement (Second) of Torts § 8A (1965). The court reads this section to mean that intent can only be shown by proof of the subjective desire to injure or the subjective belief that injury is substantially certain to occur, but comment b notes:

> Intent is not ... limited to the consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

As Judge Becker points out in In re Conte, even if one accepts the Restatement definition as controlling actions which in an objective sense are substantially certain to cause harm can be considered willful and malicious. 33 F.3d at 307-08.

In reenacting the discharge section of the Bankruptcy Act of 1898 in the code adopted in 1978, Congress used terminology in § 523(a)(6) identical to the language interpreted by the Supreme Court in Tinker. Congress could have worded the section to require specific intent to injure or an intentional tort if that was its intent, but it did not. The legislative history also does not do either; it does not mention intentional torts or say what is meant

by "deliberate or intentional." Comments in committee reports do not necessarily control meaning, see, e.g., Pierce v. Underwood, 487 U.S. 552, 567-68, 108 S.Ct. 2541, 2551-52, 101 L.Ed.2d 490 (1988), [FN4] but subsequent to the enactment of the new bankruptcy code courts have tried to conform to the points raised in the legislative history. The variety of formulations which have resulted grow out of the lack of clarity in the committee comments.

> FN4. In Pierce a less restrictive and "naturally conveyed" meaning was adopted rather than one directed by committee comments determined not to be an authoritative expression of the meaning of a phrase. Id. at 565-68, 108 S.Ct. at 2550-52.

No other circuit interprets the statute or the legislative history to require proof of a subjective intent to injure or proof of an intentional tort. [FN5] The court describes its understanding of the statute as the "natural" meaning, with very little reference to the reasoning and analysis of the circuits which have reached different results. Courts draw varying meanings from the use in § 523(a)(6) of the language construed in Tinker and the legislative history behind it. While several other courts recognize evidence of specific intent to injure as one way to meet the statutory standard, none absolutely require it.

> FN5 Even when the acts of the debtor could be characterized as intentional torts, other circuits have not required that a debt result from an intentional tort judgement in order to prevent discharge. See, e.g., In re Stelluti, 94 F.3d at 88; In re Stanley, 66 F.3d at 667-68.
>
> The court is not clear about what its requirement of an intentional tort means. If the intent were to restrict 523(a)(6) to debts resulting from a judgment for an intentional tort, it would add an unprecedented substantive and procedural limitation to this section by requiring parties to obtain a

judgment before initiating an adversary proceeding to prevent discharge. If, on the other hand, the court only means to restrict § 523(a)(6) to conduct that can be characterized as intentional torts, it is inviting parties to litigate state tort actions in the bankruptcy court. For example, in this case, the Kawaauhaus could plausibly argue that Dr. Geiger's actions amounted to battery. See Restatement (Second) of Torts §§ 18-20 (1965).

The First, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits all employ a standard that prevents discharge of a debt if the debtor's act could be predicted to produce the injury suffered by the creditor, but the precise wording of the standard varies. The Sixth Circuit construes willful to apply to an act done intentionally which necessarily produces harm, and malicious to mean wrongful, without just cause or excuse, or excessive. Vulcan Coals, Inc. v. Howard, 946 F.2d 1226, 1228-29 (6th Cir. 1991), (citing Perkins v. Scharffe, 817 F.2d 392, 394 (6th Cir.), cert. denied, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 112 (1987)). Similarly, the Ninth Circuit, reading willful and malicious together, requires an act done intentionally that necessarily produces harm without just cause or excuse. In re Zelis, 66 F.3d at 208. The Third Circuit standard for willful and malicious is an act done intentionally which is "substantially certain to result in injury or where the debtor desired to cause injury." In re Conte, 33 F.3d at 308. The Eleventh and Fifth Circuits, like the Third, require proof of an intentional act with the purpose to cause injury or one which is substantially certain to cause injury. In re Delaney, 97 F.3d 800, 802 (5th Cir.1996) (per curiam); In re Walker, 48 F.3d at 1165.

Two circuits use somewhat different terminology, but their focus on the foreseeability of the injury is similar to the examination required by other circuits. In the Tenth Circuit, there will be no discharge if the debtor acts "knowing full well that his conduct will cause particularized injury." In re Pasek, 983 F.2d

at 1527, Creditors "are not restricted to direct evidence of specific intent to injure in satisfying the requirements of § 523(a)(6) ... 'the debtor's actual knowledge or the reasonable foreseeability that his conduct will result in injury to the creditor' are highly relevant." Id. (citations omitted). In the First Circuit, "the term 'wilful and malicious' in § 523(a)(6) means an act intentionally committed, without just cause or excuse, in conscious disregard of one's duty and that necessarily produces an injury." Printy v. Dean Witter Reynolds, Inc., 110 F.3d 853, 859 (1st Cir.1997) (citation omitted).

The standards in the remaining circuits which have ruled on the question vary, but none requires intent to produce the injury. In the Second Circuit the standard requires an intentional and deliberate act which is wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will. In re Stelluti, 94 F.3d at 88. In the Fourth Circuit a debtor's injurious act, done deliberately and intentionally, in knowing disregard of the rights of the other, is sufficiently willful and malicious to prevent discharge, even if a debtor bears a creditor no subjective ill will or specific intent to injure. In re Stanley, 66 F.3d at 667. The Seventh Circuit has concluded that § 523(a)(6) does not require specific intent to injure in order to prevent discharge, but it has not developed a definition beyond that. In re Thirtyacre, 36 F.3d at 701.

The only other circuit to rule on the dischargeability of a medical malpractice debt under § 523(a)(6) [FN6] declined to discharge the physician's debt on facts very similar to those in this case. In Perkins the doctor had unnecessarily injected the patient's foot with an unsterile needle, failed to perform timely tests on the resulting infection, subsequently ignored the belated test results, and failed to hospitalize the patient when hospitalization was necessary. The court, citing the leading bankruptcy treatise, employed the standard of "a wrongful act done intentionally, which necessarily produces harm and is without just

cause or excuse" and concluded that it was met by the facts. Perkins, 817 F.2d at 394 (citing 3 Collier on Bankruptcy 523-111 (15th ed. 1986)).

> FN6. The Tenth Circuit has also addressed the dischargeability of a medical malpractice judgment, but that case was applying the "willful and malicious injury" section of the Bankruptcy Act of 1898. See In re Thurman, 901 F.2d 839, 841 (10th Cir. 1990) (discussing In re Franklin, 726 F.2d 606 (10th Cir. 1984)).

Dr. Geiger's debt should similarly not be discharged. It is not necessary in this case to consider whether the Perkins standard or one of the other circuit definitions of willful and malicious is most appropriate in light of the legislative history and policy because even under In re Long the debt is not subject to discharge.

Until today this court's construction of the statute, although more restrictive than some, was generally within the range of interpretations found in other circuits. Many of our previous cases use a standard for § 523(a)(6) which was articulated in In re Long, 774 F.2d at 881. See In re Waugh, 95 F.3d 706, 711 (8th Cir. 1996); In re Miera, 926 F.2d at 743-44. In re Long concluded "willful" meant conduct which was "headstrong and knowing," and "malicious" meant "targeted at the creditor" at least in the sense that the injury is certain or almost certain to occur. Id. at 881. Since "intentional harm may be very difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent." Id. Although the court cites In re Long in support of its conclusion granting discharge, it actually enunciates a significantly more restrictive standard. [FN7]

> FN7. The court also cites Cassidy v. Minihan, 794 F.2d 340 (8th Cir. 1986), which held that an injury caused by a drunk driver was not an intentional injury and therefore the debt was dischargeable. Cassidy considered the legislative history connected with the enactment of the bankruptcy code and determined that "Congress intended to bar the discharge of intentionally inflicted injuries," id. at 344, but it did not consider by what standard such intent would need to be shown and it did not have the benefit of the many other circuit discussions which have issued since 1986.
>
> Subsequent to the events giving rise to Cassidy, Congress amended the statute to bar discharge of debts arising from drunk driving accidents, see 11 U.S.C. § 523(a)(9) (1997), illustrating that Congress can easily amend the statute if it is unhappy with its interpretations.

Dr. Geiger's debt should not be discharged under In re Long because his admitted administration of substandard care shows an almost certain likelihood of harm resulting from headstrong and knowing acts. The bankruptcy court found that Mrs. Kawaauhau reported to Dr. Geiger complaints of fever and a swollen foot which was oozing pus. After receiving test results that changed his initial diagnosis from thrombophlebitis to one of infection, Dr. Geiger knew the most effective treatment was intravenous penicillin, and yet he prescribed oral penicillin. He then traveled away and left his patient in the care of other doctors who switched Mrs. Kawaauhau to intramuscular penicillin and Moxam and authorized a transfer to a specialist. When he returned, Dr. Geiger noted that Mrs. Kawaauhau appeared to be doing better after his absence. He chose to terminate her intramuscular treatment, however, to cancel the transfer to a specialist, and to discontinue all antibiotics only four days after starting them. Dr. Geiger admits he knew his care was substandard, and the uncontested expert testimony was that his intentional substandard care harmed Mrs. Kawaauhau. The district court did not err in concluding that the evidence and the findings of the bankruptcy court prevent discharge under In re Long.

Interpreting § 523(a)(6) to require an intentional tort and proof of a specific intent to injure does not further the policy underlying this section. Section 523(a) makes it clear that Congress did not intend all debts to be forgiven, notwithstanding its general policy of allowing a debtor a "fresh start." See Miera, 926 F.2d at 745. It intended to relieve honest and unfortunate debtors. In re Molitor, 76 F.3d 218, 220 (8th Cir. 1996). The same House report cited by the court notes one purpose of the 1978 amendments was to provide a more effective remedy for the "unfortunate consumer debtor." H.R.Rep. No. 95-595, at 4, reprinted in 1978 U.S.C.C.A.N. at 5966. Examples given of "unfortunate consumer debtors" include families suffering from a serious illness, unemployment, or aggressive consumer creditors. H.R.Rep. No. 95-595, at 116, reprinted in, 1978 U.S.C.C.A.N. at 6077. While examples listed in a committee report should not be regard as exhaustive, Dr. Geiger can hardly be characterized as an unfortunate consumer debtor. He is a medical doctor who knowingly administered substandard care to his patient. He was found by a jury to have committed malpractice, but he did not carry malpractice insurance. He had no other debts than the malpractice judgment and filed his petition for bankruptcy to avoid payment of that judgment. The unfortunate consumer in this case could easily be seen to be on the opposite side from the debtor.

By enacting the exceptions to discharge, Congress has specified that some debtors may disentitle themselves to relief, but the court's definition of "willful" is so narrow that it would defeat the purpose of § 523(a)(6) by restricting it to intentional torts or the unusual circumstance where a debtor is "foolhardy enough to make some plainly malevolent utterance expressing his intent to injure his creditor" or to express the belief that injury was substantially certain to follow. In re Conte, 33 F.3d at 308 (citation omitted). Requiring proof of a objective intent to harm "would undermine the purposes of [§ 523(a)(6)] and place a nearly impossible burden on a creditor who wishes to show that

a debtor intended to do him harm." In re Conte, 33 F.3d at 308 (citation omitted); see also In re Long, 774 F.2d at 881.

The court has greatly expanded the meaning and significance of the few words in the legislative history and has established a new standard that differs from the practice in the nine other circuits which have examined the section. Seven circuits utilize a definition which includes an intentional act substantially certain to lead to injury or one that would necessarily lead to it. [FN8] Two circuits use what might be characterized as a knowing disregard standard, and one has ruled only that the statute does not require specific intent. To the extent uniform interpretation of the bankruptcy code is seen as a policy goal, the court today does nothing to further it. See e.g., Perkins, 817 F.2d at 395 (Engel J. concurring).

FN8. Three of these also have an alternative standard similar to the court's requirement of purpose to cause injury, but they do not limit the creditor to this option alone.

There is no reason to create a special shield for medical malpractice judgments without a showing that Congress intended to exempt this category of debts from the reach of § 523(a)(6). Just as with other types of debts, the facts of the case must be examined in order to decide the issue of discharge. Nondischarge of Dr. Geiger's debt would not mean that all other malpractice judgment debts could not be discharged. [FN9] Dischargeability depends on the facts of the individual case and whether the proof rises above reckless disregard of the rights of the creditor, whether proven by subjective intent to injure or by objective probability that the injury was necessarily or substantially certain to follow from the intended act. [FN10]

FN9. Several other red herrings have also been raised. The court's suggestion that a different result in this case would lead to an interpretation of § 523(a)(6) that would cover even a breach of contract has no support in the record.

Neither does the statement at oral argument by counsel for Dr. Geiger that failure to discharge his debt would lead to higher malpractice insurance rates.

FN10. An act that will necessarily lead to harm is the equivalent of one substantially certain to do so because "ill effects are probablistic" and it cannot be predicted that a particular result is certain or necessary. In re Conte, 33 F.3d at 308 n. 2.

The findings and record here show conduct that was more than reckless, specifically the knowing administration of substandard care that was substantially certain to cause injury. Absent "a very obvious and exceptional showing of error," this court is not free to reevaluate the evidence presented in the bankruptcy court. Judge v. Prod. Credit Ass'n of the Midlands, 969 F.2d 699, 700 (8th Cir.1992) (per curiam); see also In re Exec Tech Partners, 107 F.3d 677, 680 (8th Cir.1997). [FN11] Since Dr. Geiger inflicted a willful and malicious injury within the meaning § 523(a)(6), I would affirm the judgment denying the discharge of his debt to the Kawaauhaus.

FN11. Unlike the bankruptcy judge who was the trier of fact, the court believes that Dr. Halford's expert testimony only shows that Dr. Geiger's treatment resulted in the worsening of Mrs. Kawaauhau's infection, not that it necessarily led to any other injury to her. It bases this distinction on its suspicion that the course of an infection is notoriously difficult to predict. In contrast, the bankruptcy court found that Dr. Geiger's treatment led to the worsening of Mrs. Kawaauhau's condition and the eventual amputation of her leg. Even if there are two reasonable interpretations of the evidence, this court is required to defer to the bankruptcy court's findings absent clear error. In re LeMaire, 898 F.2d 1346,1349 (8th Cir.1990).

APPENDIX E

11 U.S.C. §523. Exceptions to Discharge.

(a) A discharge under 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt — . . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

No. 97-115

In The

Supreme Court of the United States

October Term, 1996

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,

Petitioners,

vs.

PAUL W. GEIGER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Dr. Paul Geiger, the Respondent/Debtor, ("Dr. Geiger") served as Margaret Kawaauhau's physician for approximately five years from 1977 until 1983 (Mrs. Kawaauhau hereinafter referred to as "Petitioner," both individually and collectively with her husband, Solomon Kawaauhau). During that time he treated her for a variety of ailments, including diabetes, obesity, hypertension, chronic pulmonary disease and congenitive heart failure. Prior to the injury in question, the Petitioner had been hospitalized on 18 other occasions resulting in overwhelming medical expenses. During the course of various treatments by Dr. Geiger, the Petitioner continually expressed her concern about the costs of medical care and medications prescribed because she was unable to obtain any medical assistance to pay her mounting medical bills.

During the incident from which this appeal stems, Dr. Geiger's ability to treat the Petitioner was limited by her demands to keep the costs to a minimum. At all times Dr. Geiger believed that the course of treatment he meticulously administered to the Petitioner would heal her infection. In fact, the evidence shows that the test ordered by Dr. Geiger indicated his treatment was initially effective in combating the infection. Dr. Geiger admitted that he knew penicillin was a more effective antibiotic, but prescribed tetracycline due to the financial constraints placed on him by the Petitioner. Despite Dr. Geiger's efforts, the Petitioner's leg had to be amputated below the knee. Dr. Geiger did not intend to harm the Petitioner which was admitted by the Petitioner.

Petitioner filed a malpractice suit against Dr. Geiger and obtained a judgment. On March 16, 1989, Dr. Geiger filed a Petition for Relief pursuant to Chapter 7 of the Bankruptcy Code. Petitioner filed a Complaint in the United States Bankruptcy

Court seeking to except the debt from discharge pursuant to 11 U.S.C. § 523(a)(6). Trial was held on the merits of the Complaint in the Bankruptcy Court on September 6, 1990. Petitioner's sole source of evidence at trial was transcripts from the state court trial and the deposition of their expert, Dr. Peter Halford. No witnesses were presented by the Petitioner. Dr. Geiger testified in his defense at the trial. The Bankruptcy Court excepted the malpractice judgment from discharge pursuant to 11 U.S.C. § 523(a)(6). *In re Geiger*, 172 B.R. 916 (Bankr. E.D. Mo. 1994). The Bankruptcy Court, based on a review of the deposition of Dr. Halford, concluded that "Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." (App. A-13).[1]

In affirming the decision of the Bankruptcy Court, the District Court stated that Dr. Geiger's admission that he knew he was providing Mrs. Kawaauhau with substandard care when he prescribed oral penicillin rendered his conduct willful. (App. 22). In addition, the District Court determined that his conduct was certain or substantially certain to cause physical harm rendering it malicious within the meaning of the relevant provisions of the bankruptcy code. (App. 22).

Respondent appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit. The Appellate Panel unanimously reversed the decision of the District Court. *In re Geiger,* 93 F.3d 443 (8th Cir. 1996). The Appellate Panel noted that the worst that might even colorably be said of Dr. Geiger's behavior was that he was reckless, and that since there was no evidence that he intended to harm his patient, it was not possible to say that his actions were either willful or malicious, much less both. (App. 25).

---

1. App. — Referenced are to the Appendix filed by the Petitioner.

Petitioner filed a Petition for Rehearing En Banc before the Eighth Circuit Court of Appeals which was granted. After a thorough review of the legislative history, the Circuit Court reversed the District Court. (App. 37). The Circuit Court stated that

> since it is not even alleged that Dr. Geiger intended to inflict an injury on his patient, and it cannot be said that he believed that an injury was substantially certain to result, the judgment underlying the case could not have given rise to a "debt . . . for willful and malicious injury by the Debtor," see 11 U.S.C. § 523(a)(6)

(App. 37). Due to the fact that the Circuit Court found that no intentional tort had been committed, it concluded there was no willful conduct. (App. 36). The Circuit Court indicated that in light of its finding that there was no willful conduct, it was not necessary to decide the meaning of the word malicious where 11 U.S.C. § 523(a)(6) requires that the injury be both "willful and malicious" before a debt is excepted from discharge. (App. 37).

The Petitioner has filed a Writ of Certiorari with this Court to review the decision of the Eighth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

The Petitioner bases their petition on an alleged conflict among the circuits on the definition of the terms "willful and malicious" found under 11 U.S.C. § 523(a)(6). The two medical malpractice cases cited by the Petitioner are factually distinguishable from the present case. Therefore, the cases do not result in a "conflict" among the circuits. The remaining cases

cited by the Petitioner are also factually distinguishable in that they do not involve the discharge of debts resulting from medical malpractice.

The Tenth Circuit case, *In re Franklin*, 726 F.2d 606 (10th Cir. 1984), cited by the Petitioner involved a doctor who committed medical malpractice by failing to take a patient history before he prescribed anesthesia. The doctor then tried to cover up the records and hide his error. Unlike the doctor in *Franklin*, Dr. Geiger did not cover up the records, nor did Dr. Geiger hide his method of treatment of the Petitioner.

The Sixth Circuit case, *In re Perkins*, 817 F.2d 392 (6th Cir. 1987), cited by the Petitioner was based on the *Franklin* decision. In *Perkins*, the doctor unnecessarily injected Mrs. Perkins' left foot with an unsterile needle, failed to perform timely tests when resultant infection was apparent, and then ignored test results that identified the offending bacteria and the appropriate drugs needed to treat the patient. Unlike Dr. Geiger, who constantly monitored his patient and her test results, which lead him to believe his treatment would improve the patient's health, the doctor in *Perkins* completely ignored his patient.

In both *Franklin* and *Perkins*, malice could be implied from the physicians' actions to cover up their mistakes and indifference towards their patients. The concurring opinion in *Perkins* noted that the appalling conduct of the doctor was *not* a willful and malicious injury under § 523(a)(6), but rather reckless conduct which is dischargeable according to legislative history. Nevertheless, the concurring opinion implied that uniformity with the *Franklin* decision was more important than the proper interpretation of the statute. *In re Perkins*, 817 F.2d 395. Therefore, the *Perkins* decision was based on the *Franklin* case which found an intentional injury as a result of covering up the records.

The remaining cases cited by Petitioner were not medical malpractice discharge cases. While it is true the Circuit Court decisions cited by Petitioner involved different interpretations of 11 U.S.C. § 523(a)(6), the cases are entirely factually distinguishable.

The Eighth Circuit Panel *en banc* in the case at bar thoroughly reviewed the legislative history of § 523(a)(6). The Eighth Circuit also analyzed numerous opinions from other Circuit Courts, as well as this Court, in reaching its decision. The Eighth Circuit decision is consistent with the legislative history which specifically overruled a "reckless disregard standard" in deciding what debts were not dischargeable. (App. 32).[2] Finally, the Eighth Circuit interpretation of § 523(a)(6) supports the fresh start policy on which the Bankruptcy Code is based.

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2. The Eighth Circuit decision is further supported by the enactment of 11 U.S.C. § 523(a)(9) which carved out an exception to discharge for injuries caused by operation of a vehicle while under the influence of alcohol, a drug, or another substance. Previously, such acts were dischargeable under 11 U.S.C. § 523(a)(6). It is important to note that Congress created an entire new subsection to address this type of reckless conduct rather than amend § 523(a)(6).

CONCLUSION

No other circuit is in conflict with the specific issue of medical malpractice where there is no additional wrongdoing on the part of the doctor. In the *Franklin* and *Perkins* cases, relied upon by the Petitioner, the court transferred the doctor's intent to deceive the patient to show the doctor intended to cause injury to the patient. Dr. Geiger did not intend to harm or deceive the Petitioner.

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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(4)

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No. 97-115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,
Petitioners,

v.

PAUL W. GEIGER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED SEPTEMBER 29, 1997

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 89-01062

In The Matter Of:
PAUL W. GEIGER,
Debtor.

MARGARET KAWAAUHAU
and SOLOMON KAWAAUHAU,
Plaintiffs,

vs.

PAUL W. GEIGER,
Defendant

St. Louis, Missouri
September 6, 1990
9:00 O'clock A.M.

AP No. 89-0154

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID P. McDONALD

APPEARANCES:

For the Plaintiffs: NORMAN W. PRESSMAN, ESQ.
DANIEL L. GOLDBERG, ESQ.

For the Defendant: MICHAEL K. SHEEHAN, ESQ.
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* * *

[23]

MR. GOLDBERG: Judge, would you like me just to read the questions and answers into the record?

THE COURT: Right, Yes.

MR. GOLDBERG: Okay. Judge, we would go first with the deposition of — or the trial testimony of Dr. Geiger, which is Plaintiffs' Exhibit 4. We would direct the Court's attention to page 19, picking up on the fourth line. And this is the testimony of Dr. Geiger.

"A I said she asked me point blank, 'Do you think you can save my leg,' on January 4th. And I told her I didn't know. This is a real serious problem."

Continuing on to page 38, line 21.

"Q And it's your testimony today that as of that time you recognized that the standard of care for this patient was Penicillin by the intravenous route for her streptococcus infection, is that correct?

"A Yes. But she wouldn't permit me to give it."

MR. SHEEHAN: Could you hold a second? Thank you.

MR. GOLDBERG: Continuing on line 25,

"Q Do you acknowledge that the proper standard of care from the 7th of January until the morning of the 12th, when you discontinued her antibiotics, was Penicillin intravenously?

"A I'll repeat my same answer.

"Q And what was that?

"A That that would be best, but sometimes we're not [24] permitted to give the best.

"Q No. The question was, do you acknowledge that that was the standard of care?

"A Yes."

That's all from the trial transcript of Dr. Geiger, Your Honor.

THE COURT: All right.

MR. GOLDBERG: Next we would direct the Court's attention to Plaintiffs' Exhibit 1, page 40. This is the trial transcript of Margaret Kawaauhau. The question is being asked by Dr. Geiger. Line 21,

"Q Did you ever discuss the costs of medical care with me?

"A I don't believe so.

"Q Costs of medication, for example?

"A I don't believe so.

"Q Okay. Or costs of laser treatment?

"A No.

"Q Okay. Okay. Before you — you know, when I cancelled the trip to Honolulu, did we talk about it?

"A No, I don't — we had no conversation at all. No, I don't — I don't remember it if we did.

"Q Okay. You don't remember. This is going to be a hard question for me to ask. Do you really want to get well?

"A Yes."

Next, Judge, we direct the Court's attention to Plaintiffs' [25] Exhibit 2, which is testimony of Solomon Kawaauhau.

MR. SHEEHAN: Hold on one moment.

MR. GOLDBERG: And we direct the Court's attention to page 14, line 19. These questions are being asked by the plaintiffs' counsel.

"Q Now, you heard what Dr. Geiger said in his opening statement when the case was just started?

"A Yes.

"Q You heard him say that your wife told him to cut the cost down. You heard that?

"A Yes, I heard that.

"Q You ever talk to Dr. Geiger about cutting the cost down on your wife's medication?

"A She — I wouldn't do that because my wife more important than cutting the cost down. He didn't say anything about cutting the cost, but I felt if the cost is there, I rather my wife would be alive than the cost, you know, the expense, huh?"

Next, Judge, we turn our attention to Plaintiffs' Exhibit 3, which is the deposition of Dr. Halford. Your Honor, this is only a 13 page deposition and we would feel that the whole thing is important, as well as all the exhibits attached. Would the Court like me to read through this entire deposition?

THE COURT: So, you're requesting the Court take

* * *

[36]

PAUL GEIGER — DIRECT

A. Yes, they do.

Q And did you take any exams to be a doctor, to be licensed in a particular state?

A Yes. I took an examination to be licensed in Missouri and I also took a licensure exam in Hawaii.

Q When did you take your license in — when did you take your exam for you license in Missouri, Doctor?

A It was in 1966.

Q 1966?

A Yes.

Q And what year did you get out of medical school?

A 1966.

Q. I see. And when did you take your exam to become licensed in Hawaii?

A I believe it was in 1971 or '72.

Q I see. Shortly after you got out of medical school where did you go to practice?

A I went and did an internship in Honolulu, Hawaii at St. Francis Hospital. It was a rotating internship and you're exposed to all different kinds of patients.

Q Okay. How did you originally come in contact with Mrs. Kowahowa (phonetic)? And [sic] I pronouncing it correctly, Doctor?

A Kowahow (phonetic)

Q Kowahow (phonetic). How did you originally come in contact with her?

[37]

A She came to my office seeking to be a patient.

Q Seeking what, sir?

A To be a patient.

Q I see. Did she say she had a particular medical problem?

A Yes. She had several medical problems.

Q What were they, Doctor?

A They included diabetes, obesity, congestive heart failure, chronic obstructive pulmonary disease. I — when — yeah, those were the main problems she had.

Q I see. And about what year was that? Do you remember?

A I'm — without the record I'm guessing it would be about three years before the 1988 hospital — excuse me — the 1980 hospitalization, so it would be about 1977.

Q How long did you treat her, Doctor?

A Approximately three years.

Q From 1977 to 1980 approximately?

A That's right.

Q I see. Did you review her medical history before treating her?

A Yes, I asked her several questions and I gave her an examination when she first came in as a patient. And then I hospitalized her twice before the hospitalization under question. During those two hospitalizations she was critically ill, desperately ill with a combination of congestive **[38]** heart failure and her asthma or chronic obstructive pulmonary disease. And she improved both times.

Q Was she close to death?

A Yes, she was, both times, yes.

Q What years were that that you — do you remember the years, doctor?

A No, I don't.

Q Was it between '77 and '80?

A Yes.

Q Did you say she was close to death on those occasions?

A She was very close to dying, yes.

Q And were you her treating physician, Doctor?

A Yes, I was.

Q Okay. And did she ever, in fact, express concerns to you about cost?

A Yes, she did. On several occasions. And as I wrote in my hospital — I mean — excuse me — in my office records, she complained about the high cost of laser surgery that because of

her diabetes was necessary to preserve her sight. She also complained of — about the costs of medication that I prescribed for her. And she — I think another thing was she frequently did not keep her appointments to — you know, her follow up appointments because I think she couldn't afford the medical care.

MR. GOLDBERG: Objection. Calls for speculation, **[39]** Judge.

THE COURT: Sustained.

MR. SHEEHAN: Okay.

THE COURT: The laser surgery that you talked about, did she actually have the laser surgery?

THE WITNESS: Yes, Your Honor, she did, in Honolulu.

THE COURT: Okay. Now, you don't perform or did not perform any of the surgery that's involved in these cases, did you?

THE COURT: [sic] I assisted on the amputation, Your Honor.

THE COURT: Okay.

MR. SHEEHAN: I'm sorry. Would you repeat that? I didn't hear that.

THE WITNESS: I assisted at the amputation of the leg.

BY MR. SHEEHAN:

Q I see. The times that she was close to death, did you prescribe medication for her at that time?

A Yes. Yes, I did.

Q Do you remember what you prescribed, Doctor?

A I prescribed bronchial dilators or medication to open up her bronchial tubes. Digitalis or Digoxin preparations to make her

heart beat stronger. Diuretics to try and reduce her fluid overload. Also Insulin. Oh, and she was also **[40]** hypertensive, too. I forgot that. She had to — I had to manage her hypertension also.

Q All right. Getting more into the time that she — well, the incidents surrounding the loss of her leg, did she come to you for that, too?

A Yes, she did.

Q Any by the way, Doctor, did you charge her anything for any of this?

A Yeah. I charged the standard fees.

Q What were the standard fees? Do you remember?

A I'm guessing —

MR. GOLDBERG: Objection, Your Honor. This is irrelevant.

THE COURT: Overruled.

THE WITNESS: I remember for her hospitalization for the amputation my total charge was $300.00 including — and that included the assisting at the time of surgery. She was in the hospital about two months.

BY MR. SHEEHAN:

Q Did you ever get paid anything?

A Yes, I did.

Q Do you remember about how much?

A I think she paid the whole bill.

Q About how much was that?

A About $300.00.

[41]

Q Okay. Was that for her treatment over the entire three years?

A No, that was just for that — that was just for the hospitalization involving her amputation.

THE COURT: That's a — but did you say three months that she was in the hospital?

THE WITNESS: Well, she was — altogether — part of that time was in what's called Skilled Nursing, Your Honor.

THE COURT: Uh-huh.

THE WITNESS: I think two to three months. Probably two.

THE COURT: So the $300.00 represented your services for that two or three months?

THE WITNESS: Yes, Your Honor.

THE COURT: How old was she?

THE WITNESS: She was in her early fifties, Your Honor, I'm pretty sure. I'm not completely sure on that.

THE COURT: Okay.

BY MR. SHEEHAN:

Q Standard fees, I didn't know — bear with me. I didn't know there were standard fees.

MR. GOLDBERG: Objection, Judge.

THE COURT: Sustained.

MR. SHEEHAN: Yeah, that's fine.

BY MR. SHEEHAN:

[42]

Q Who usually pays for the medicine?

A The patient.

Q Okay. Did you hear me read what is known at Exhibit 4, their exhibit, Creditors' Exhibit 4?

A I'm — yes, I heard —

Q You heard me read from the record?

A. Yes, that's right.

Q Do you remember reading at the lower court trial, do you remember reading that into the transcript?

A Yes, I do.

Q Were those your words, Doctor?

A Those were my words quoting from the record.

Q What were you reading when you read that?

A I was reading from the Skilled Nursing nurse's notes.

Q I see. Who was that skilled nurse?

A I — without the record, I wouldn't know.

Q Was it a hospital nurse?

A Yes, it was a hospital nurse.

Q By skilled nurse you mean a particular person that was there?

A Okay. Yes, it was a nurse in Hilo Hospital.

Q I see. Did Mrs. Kawaauhau ever express to you a concern for medical expenses?

A Yes, she did.

Q Okay. What did she tell you to do?

[43]

A. Okay. As a condition for her being admitted to the hospital in order to try and save her leg, she said I had to keep the cost to a minimum and on top of that I had to keep it quiet or not tell

anybody about the fact that I was to keep costs at a minimum. I had — you know, she like told me not to disclose that information to anybody.

Q Why did she tell you to do that, Doctor:

MR. GOLDBERG: Objection.

THE COURT: Sustained.

BY MR. SHEEHAN:

Q Okay. Did she tell you why she was concerned about that?

A No.

Q Okay. Doctor, did you put that into the record?

A No, I couldn't because that would be a disclosure.

Q I see. Did you cover up any records?

A No, I never covered up any records.

Q Did you alter any records?

A No, sir.

Q Did you know that -- so it was a nurse who put that into the record, is that correct, sir?

A That's correct. What I read, yes, that was put in by the nurse.

Q I see. Did you hospitalize her, Doctor?

A Yes, I did.

Q What was her condition when you hospitalized her? And I **[44]** want to concentrate on the time that she lost her leg. Tell us about what happened when she came in your office and the series of events that led to your hospitalization of her.

A Well, as soon as I — I hospitalized her the day that she came into the office with this infection. She also had — okay, she had puss [sic] coming out from underneath her great toenail. She also had a very painful calf. Okay. And my concern was that with her

extremely delicate cardiopulmonary condition that if she had a clot go from her calf into her lung it would probably kill her. So I want — my treatment when I hospitalized the lady was — there's like two prongs to it. One was anticoagulation to prevent further clot formation and the other one was antibiotics to treat the infection.

Q Go ahead. What happened then, Doctor?

A Okay. So I gave her Heparin, which is a very fast acting anticoagulant. I also gave her Coumadin, which is a slower acting anticoagulant and it's a lot cheaper. Because of the cost constraints I only gave her enough Heparin till where the Coumadin took over, so to speak. Okay. They have overlapping effects on the body. Okay. Another thing is that the antibiotics have a profound effect on Coumadin, which is a [sic] anticoagulant and this became important because her prothrombin time became so prolonged. You know, she was —

[45]

THE COURT: You've go to understand that I'm not a doctor.

THE WITNESS: Okay. Yeah.

THE COURT: So when you say — some of this I can follow you, but I — and I understand that you've been saying so far about the Heparin, but this last phrase you used I don't have the slightest idea what you're talking about.

THE WITNESS: Okay. Let me explain what that is. A prothrombin time is a measure of the clotability of blood. And in a normal person it's approximately 13 to 15 seconds. And then when you give Coumadin you want to extend that time out to about 20 to 30 seconds. Okay, at the time I discontinued her antibiotics her prothrombin time was 80 seconds, you know, indicating that she could have bled to death. Or another possible complication is that she could have had an intracranial hemorrhage and had a stroke and died that way, too. Okay.

BY MR. SHEEHAN:

Q Let me interrupt you, Doctor.

A Yes.

Q Were you personally treating her at this time?

A Yes, I was.

Q I see. And would you consider this a life-threatening situation?

A Yes.

[46]

Q Okay. Did you realize she might lose her leg?

A Yes, I did.

Q Go ahead, Doctor. Continue with what happened.

A Okay. I started Tetracycline. I had took cultures from her leg. I also took another culture from a blister that developed on her calf. They both grew out this strep bug or it's called streptococcus pyogenes.

Q Is that a germ?

A Yes. Excuse me. It's a bacteria. We did sensitivity tests to the particular bacteria. What that means is we plated the bacteria on an auger plate and then we put discs of antibiotics on the plate also to see what antibiotic would be most effective against this particular streptococcus. And Tetracycline — according to that test, the Tetracycline was a very excellent drug to give her.

Q Did you actually do this yourself, Doctor?

A No.

Q Did you oversee it?

A I over — yeah, I oversaw it in the bacteriology laboratory at Hilo Hospital. I had a pretty good relationship with a technician there and we looked at the plates daily.

Q Is the use of Tetracycline — let me see if I understand. You tested what this germ was that she had, or bacteria, to see if this particular antibiotic would have an effect on it, is that what you're saying.

[47]

A That's what I'm saying, yes.

Q And that did have an effect on it?

A Yes.

Q Did it kill it or —

A It killed it, yes. Uh-huh.

Q Oh. Is Tetracycline commonly used?

A Tetracycline, it has been used against streptococcus, yes.

Q I see. Is it commonly used? Is Tetracycline commonly used?

A It's — I'd say Penicillin is more commonly used against strep.

Q I see. But is Tetracycline commonly used?

A Yes, it's commonly used, yes.

Q Is Penicillin also commonly used?

A Yes.

Q As long as you brought that up.

A And other drugs include Erythromycin, Cephalosporin. Actually, according to the sensitivity tests there was only one antibiotic that failed to kill this particular strep. And that —

Q What was that, Doctor?

A That was Amikacin, which is an aminoglycoside. That's a [sic] antibiotic that's good for so-called gram negatives like the bacteria that grow in our colons. But streptococcus is a so- **[48]**

called gram positive bug and this particular one is sensitive to all antibiotics except for one.

Q Now, did you say there was one test given or two tests? I think you called them plate culture tests?

A There were two.

Q Two. And did you —

A One was — excuse me. One was from the toe and one was from the blister.

Q Did you direct that this be done, Doctor?

A Yes, I did.

Q Was that your decision?

A Yes.

Q Okay. Go ahead, Doctor. Then how many days are we into the hospital stay now, about?

A I think the second or third day.

Q I see.

A Okay. And her blood pressure dropped somewhat. So I gave an intravenous dose of Vibramycin, which is a form of Tetracycline. There were — there are two reasons — well, there's a reason that I started with Tetracycline was because I didn't know what the culture was going to show initially. You know, you start it with a broad spectrum antibiotic.

Q Is Tetracycline a broad spectrum?

A Yes, its a very broad spectrum.

Q Is that a typical medical procedure that you start with a **[49]** broad spectrum antibiotic?

A I think so, yes.

Q Okay.

A Okay. Also — I proceeded with her anticoagulation and that went alarming — in other words, her anticoagulation proceeded too fast to a dangerous level, so I had to try and reverse it by giving her oral vitamin K to try and — you know, I didn't want her blood to be too thin or have too much of a propensity to bleed.

Q Well, this is the third day, Doctor, right?

A Uh-huh.

Q Were you visiting her every day?

A Yes, I was.

Q And were you — I don't know how a doctor makes determinations of these things, but were you treating her to make determinations on a daily basis?

A Yes, I was.

Q Okay.

A I was examining her, examining her leg and changing the medications as directed. Now, then after I gave the intravenous dose of Tetracycline, the next day the patient, number one, she refused to have her blood tests so that I could, you know, monitor how her anticoagulation was proceeding. Also some other blood tests to check on the status of her kidneys. Just a blood count to just check on — make sure she wasn't **[50]** bleeding, you know, that her blood —

Q What do you mean she refused blood tests, Doctor?

A She refused it. She told the lab technician, "I'm sorry. I'm not going to —"

MR. GOLDBERG: Objection, Your Honor, hearsay.

THE COURT: Overruled. Go ahead.

THE WITNESS: She said, "I don't want these blood tests." And then when I came in —

THE COURT: That was about the third day you say?

THE WITNESS: Approximately the second or third day, Your Honor, yes. That morning I came in and she complained bitterly that the single injection of Tetracycline had cost $27.00 and she just couldn't afford these tests.

BY MR. SHEEHAN:

Q Did you tell her at that time, Doctor, that she needed this type of test? Did you say, "You need tests"?

A Yes. And she absolutely refused.

Q How long did you talk to her? Did you discuss it with her, sir?

A I talked to her for about 15 minutes. She — at the end she just rolled over in bed and turned her back on me.

Q How often were you seeing her on a daily basis, sir?

A Well, every day. Sometimes twice a day, but usually once a day.

[51]

Q All right. Go ahead. What happened next, Doctor?

A Okay. After her leg got worse, I changed her medication to Penicillin, but I gave it by the oral route because intravenous Penicillin would have cost $40.00 per day, whereas oral Penicillin only cost $4.00 per day and she had a gastrointestinal tract that worked quit [sic] well. In other words, her gastrointestinal tract had absorbed the Coumadin as evidenced by her increased bleedability, so to speak, and so I knew her — she was absorbing the medications that I was giving. She had — in other words, she was absorbing the Penicillin and the antibiotics that I was giving orally.

Q Did you — how did you know that this particular price was what it was, Doctor?

A I went up to the pharmacist —

Q And you checked?

A — and I discussed the price with him.

Q I see.

A The hospital pharmacist.

Q Did she ask — did you inform her of the cost?

A She wasn't — she just would not discuss expensive medication with me, you know.

Q Well, how did she know that was an expensive medication, Doctor?

MR. GOLDBERG: Objection.

MR. SHEEHAN: Yeah, okay. I withdraw that question.

[52]

BY MR. SHEEHAN:

Q Go ahead, Dr. Geiger.

A Okay. Let's see. Her condition — I think it was — I remember it was a Friday, I — I — okay, I had to go to a medical conference in Honolulu. I arranged for a substi — a doctor to take over in my absence. I even introduced Dr. Walker to Mrs. Kawaauhau and showed him the problem and we discussed management of the case.

Q How long were you gone, Doctor?

A I was gone over — I left Friday night, came back Sunday evening. And I saw her Sunday — excuse me — Monday morning.

Q Approximately how long was she in the hospital for this stay, do you remember?

A Approximately six days.

Q And every other day — did you see her every day except for this period that you were gone?

A That's right, yes.

Q Now, who was this person you said you asked to watch out for her?

A Dr. Murray Walker.

Q Is he a licensed physician, to the best of your knowledge?

A Unfortunately, he's deceased. But he was a lic —

Q Well, was he? Was he?

[53]

A Yes, uh-huh.

Q Was he a practicing physician at that hospital?

A Yes, he was on the staff of HIlo Hospital, that's correct.

Q And you had business — not business dealings, but medical dealings with him in the past?

A Yes, I did.

Q Did you have confidence in his ability?

A Yes.

Q And did you ask him to watch over her because of that confidence?

A Yes.

Q And did he, in fact, watch over her, Doctor?

A Yes, he did.

Q Did he visit her daily?

A I don't know. I wasn't there.

Q Okay. But you do believe he did watch over her?

A Yes.

Q Okay, Doctor. Then was happened after you got back?

A Okay. In my absence he had gotten a surgical consultation from a Dr. Wong (phonetic), who advised her to be — advised —

MR. GOLDBERG: Your Honor, this is all hearsay.

THE COURT: Yeah, we are getting into a lot of hearsay. So I'll sustain the objection. Although it struck **[54]** me that — well, I'll sustain the objection. Go ahead.

BY MR. SHEEHAN:

Q All right. Go ahead. After you got back, Doctor, then —

A Okay.

Q Did you review — did this doctor write records?

A Yes, he did.

Q Did you review those records?

A Yes, I did.

Q In fact, did you review all medical records all the way through this entire thing?

A Yes, Mr. Sheehan.

Q Did you review all medical records anytime you treated her?

A Yes, I did.

Q Okay. Than after you got back, Doctor, then what happened?

A Okay, then she started — the skin of her leg had turned black. We took cultures again and at this time there was no growth. In other words, I felt the infection in her leg had burned itself out. In addition to that her kidney function had deteriorated somewhat and she was — also had developed a cough. I took a sputum culture and it grew out a yeast, what is called candida albicans. And this was evidence of what I call superinfection.

[55]

Q This is a test for infection, Doctor?

A Yeah.

Q Okay.

A That's right. It's a test of what is causing a lung infection. Okay. Also I repeated her prothrombin time and I found it to be dangerously elevated. As I mentioned, it was around 80 seconds. So I —

Q What does that mean, Doctor?

A It means she could bleed to death.

Q She could?

A Could yes. Or she could have a cerebral hemorrhage, which could kill her.

Q Okay.

A Let me think. That's all. So, okay, I stopped her antibiotics because one of them increased the bleeding tendency even more than, you know, Coumadin..

Q What was that, Doctor? What antibiotic are we —

A It was a Cephalosporin type antibiotic and I don't remember the exact name. I just remember the category.

Q So you stopped that?

A Yeah. And I — there —

Q And what was your reason for stopping that again?

A Because it was increasing her tendency to bleed. Also she had — at this time she had developed a profuse uterine **[56]** bleeding, too. I obtained a OB-GYN consult and he examined her. I also obtained a consultation from a general surgeon and he recommended amputation because of her medical — multiple medical problems.

Q Did you ever discontinue — I think you just said you discontinued treatment — not treatment, but what was it?

A Antibiotics.

Q Antibiotics?

A Yeah.

Q What were your reasons for discontinuing?

A Okay. I had four. Number one, as far as I could tell by — you know, by testing the leg and culturing it, there were no more — the strep was gone. Okay. And there was a negative culture. She had been on antibiotics for eight days now, okay. Number two, she was developing signs of a superinfection. And what I mean by superinfection is when you use antibiotics for prolonged periods you have a growth of resistant strains or unusual bacteria. And in her case she had yeast growing out of her sputum, which is very unusual. It's not —

Q Doctor, what's a sputum? I don't —

A Okay. That's some — like phlegm.

Q Oh.

A Okay. So she had a very unusual — it's very unusual for people to have yeast growing out of their phlegm.

[57]

Q Yeah. Go ahead.

A So — and the reason that it happened was because of her high dose of antibiotics. Okay. Also her kidney function was deteriorating and I — because her kidneys were deteriorating her blood levels of antibiotics were quite high. You know, in other words, that's the way a lot of antibiotics get out of the system is through the kidneys. Okay. And since her kidneys were deteriorating, that's another reason I stopped antibiotics because I felt she was getting toxic from the antibiotics she had received.

Q How long did you discontinue? Oh, I'm sorry, Doctor. Strike that. You had a fourth reason. Didn't you say you had four reasons:

A Let's see. Yeah, the fourth reason was the antibiotics were contributing to her thinning of the blood, so to speak. In other words, the blood was less coagulable because of the antibiotics.

Q Now, what did you discontinue? What medications did you actually discontinue?

A The Cephalosporin antibiotic and I think one or two other antibiotics that Dr. Walker had ordered in my absence.

Q Were the — I need to — this is — was the medication in her system?

A Yes, it was.

Q Can you measure that?

[58]

A Yes, you can.

Q Did you measure it?

A No, I didn't.

Q How do you know it was in her system?

A It was inject — in these cases it was injected into her system.

Q So you knew it because of the injection?

A I presume, yeah, it was in her system.

Q I see. How long did you discontinue?

A Approximately two days. Then the general surgeon restarted a form of Penicillin when he — you know, when I consulted him.

Q Did you treat her on those — at that two day period?

A Yes, I did.

Q Were you there with her every day?

A Yes.

Q Trying to make the new determinations of her condition?

A That's right.

Q Okay. Go ahead, Doctor. Then what happened?

A Then we waited for a bit and then Dr. Oldfather (phonetic) the surgeon, thought it would be best to amputate her leg and I agreed, reluctantly. I had — quite frankly, if her condition had — if —

MR. GOLDBERG: Objection, Your Honor. This is nonresponsive.

THE COURT: Sustained.

[59]

BY MR. SHEEHAN:

Q Okay. What was her condition, Doctor?

A Her condition was very grave. I felt that amputation was necessary to save her life.

Q Where did the amputation take place?

A It took place below the knee and — I mean — you mean the operation or the —

Q Well, go ahead, answer it that way, please.

A It was a below the knee amputation and it was — it took place in the operating room of Hilo Hospital.

Q And was that your hospital?

A Yeah. I was on the staff of Hilo Hospital.

Q Oh, I see. All right. Just a — then did she ever — how long before she left the hospital, Doctor?

A Okay. After that period she stayed in the — what we call the acute section of the hospital for about another week and then

she was sent down to what we call skilled nursing where she stayed about six weeks. During that time she — her kidney function, which had deteriorated, improved. Also her white blood cell count slowly dropped. Her uterine bleeding stopped. And with iron treatment and transfusions, transfusions ordered by Dr. Oldfather, the surgeon, her — she was also anemic, by the way. I forgot to mention that. Anyway, her blood count came back to normal. She — her stump healed. She had to have a couple of — on the day of

* * *

[62]

Q Doctor, as to the home visits, did you — was there any reason why you wanted her to come into the office?

A Yeah, as I explained, I wanted to weigh her and I also wanted to do a thorough female examination, which I couldn't do at the home.

Q Why not, Doctor?

A I don't think that was the place. I like to — why — it's my custom to have a nurse present when I do that kind of examination.

Q Does it require any special equipment?

A Yeah, it does. It requires a vaginal speculum, which is quite portable and it could be used in the home, but it also requires special lighting, too.

Q I see. Doctor, did you explain the difference between Tetracycline and — or did you — strike that. Did you explain the difference between oral and intravenous antibiotics?

A No, I don't think I ever did.

Q You did not explain that difference to her?

A No, I don't think so.

Q Did you explain the difference between —

A Or I don't know. Don't know.

Q I see.

A I may have, but I don't know.

Q Did you explain the difference between Tetracycline and
[63] Penicillin?

A I don't think she'd be able to understand that, so I don't think I under — I don't know if I — I don't know.

Q Did you talk to her about the entire situation?

A Yeah, I did.

Q — medically?

A Yes, I did.

Q Her medicine that she was being given?

A Yeah. Yes, I did.

Q But what you're not sure of is whether or not you gave her the exact details of —

A I don't know if I went into — I don't think I went into technical details. I explained to her that I thought — what I thought was necessary.

Q What did you tell her, Doctor?

A I thought she needed intravenous antibiotics. She refused point blank.

Q Okay. Now Doctor, you sat her [sic] during the opening arguments and you heard learned counsel say that you fled the jurisdiction of Hawaii. Now, when you came to St. Louis, why did you come to St. Louis?

A There were several reasons. I was pretty depressed by my medical malpractice case, I have to admit. And I — there was — that's a — there are a lot of reasons, you know. I thought — there are a lot of reasons.

[64]

Q Was this a well known case in —

A I don't know. That's hard to say.

Q Did you [sic] colleagues know of it, Doctor?

A Yeah, they did, uh-huh.

Q Were you embarrassed by it?

A Yes. Yeah, I'm — I — you know, any time anything happens like that, you know — yes.

Q Doctor, why did you pick Missouri to come to?

A I had a license to practice here and I needed, you know, to continue to make a living.

Q I see.

MR. SHEEHAN: One moment, Your Honor.

BY MR. SHEEHAN:

Q Dr. Geiger, have you ever harbored wilful or evil thoughts towards this person?

A No, I never have.

Q Did you ever do anything to try to hurt her?

A No.

Q Before you decided on Tetracycline, did you refer to any particular professional documents or books or anything like that?

A Yes, I did. I referred to the Physicians' Desk Reference and I also in my studies I referred to a text book called Goodman & Gilman (phonetic), which is a textbook of pharmacology.

[65]

Q What did the books say about Tetracycline, Doctor?

A It's an excellent —

MR. GOLDBERG: Objection, Your Honor.

THE COURT: Overruled

THE WITNESS: It's an excellent broad spectrum antibiotic.

BY MR. SHEEHAN:

Q Do you have the book with you today, Doctor?

A Yes, I have the Physicians Desk Reference.

Q This book right here?

A Yes, sir.

Q Can you show us where — this is the book you referred to?

A Well, that's a 1990 [sic] edition. I would have referred to a 1983 edition.

MR. GOLDBERG: Your Honor, if I might interject something. I don't believe we're here to argue whether or not Dr. Geiger committed medical malpractice. That's collateral estopped binding upon this Court.

THE COURT: Well, you know, it's kind of hard to draw that line because although we're not going to retry the medical malpractice and there no question a verdict was rendered against the doctor and he was found guilty of medical malpractice and a judgment was rendered, but on the other hand you're asking me not to discharge this for the reason

* * *

[71]

him testify to this fact.

THE COURT: Or I think he actually already testified to it. Let me see if I can understand what the Doctor did. As I recall from your testimony, Doctor, prior to your pursuing a course of action as to what kind of medication to give this lady you went

to two reference books. One is Goodman & Gilman and the other was the Physicians' Desk Reference book.

THE WITNESS: That's correct.

THE COURT: And are these standard books?

THE WITNESS: Yes, Your Honor.

THE COURT: Commonly used by general practitioners?

THE WITNESS: Yes, Your Honor.

THE COURT: Commonly used in hospitals?

THE WITNESS: In hospital libraries, yes, Your Honor.

THE COURT: And you made reference to both of these and after you did was there anything that was different as far as the information provided in the two books? Did you come to the same conclusion after you looked at the two books as to what medication you could use?

THE WITNESS: Yeah, I decided that I would proceed the way I did.

THE COURT: Which was to use what initially?

THE WITNESS: Tetracycline, since it's a broad **[72]** spectrum antibiotic.

THE COURT: Okay. And I would assume the phrase broad spectrum antibiotic means that it's going to cover like a multitude of sins or a multitude of problems as opposed to something that's very narrow to a certain particular problem?

THE COURT: [sic] That's correct, Your Honor.

THE COURT: Okay. And would the same thing have been true of Penicillin?

THE WITNESS: Penicillin has a narrower spectrum. It generally treats the so-called gram positive organisms.

THE COURT: Are there any disadvantages in using broad spectrum drugs as opposed to something narrow?

THE WITNESS: Yes. Yeah, you can get into the problem of superinfections. In other words, you kill off everything, Your Honor.

THE COURT: Okay. Anything further?

MR. SHEEHAN: We rest, Your Honor. Thank you very much.

THE COURT: Okay. Any cross-examination?

MR. GOLDBERG: Judge, may I have a minute?

THE COURT: All right.

MR. GOLDBERG: Judge, I just have a couple of quick questions to ask Dr. Geiger.

THE COURT: I'm sorry, I didn't realize you were standing. Go right ahead.

[73]

CROSS-EXAMINATION

BY MR. GOLDBERG:

Q Dr. Geiger, when Mrs. Kawaauhau was admitted to the hospital you were aware that she had a life-threatening — possible life-threatening illness, is that correct?

A Yes.

Q And isn't it true that when you prescribed this Tetracycline you did not even prescribe the maximum dosage that she could absorb in her body?

A The reason I did that —

Q It that true, Dr. Geiger?

A Well, I gave the standard dose.

Q Well, my question is to you, sir, even though you knew that she had a life-threatening illness, you did not prescribe the maximum permissible dose according to the PDR, is that correct?

A I prescribed a standard dose, sir.

Q The standard dose for a life-threatening infection, is that correct?

A The standard dose for a infection of the foot. Her —

Q A standard dose, Doctor, if I was going to see you for a pimple or a strep throat, you would prescribe the same dosage that you prescribed to Mrs. Kawaauhau, 250 milligrams every six hours?

A That's what I gave to her because Tetracycline has to —

* * *

(9)

No. 97-115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,
Petitioners,

v.

PAUL W. GEIGER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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I. QUESTION PRESENTED

Must the Debtor intend to cause an injury in order for the resulting claim to be excepted from discharge pursuant to §523(a)(6) of the Bankruptcy Code as a willful and malicious injury?

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The opinion of the United States Bankruptcy Court for the Eastern District of Missouri in this case (*Pet. App. A1-A17*) is reported at 172 B.R. 916. The opinion of the United States District Court for the Eastern District of Missouri (*Pet. App. A18-A22*) is unreported. The opinion of the United States Court of Appeals for the Eighth Circuit panel (*Pet. App. A23-A24*) is reported at 93 F.3d 848 which opinion was vacated for rehearing *en banc*. The opinion of the United States Court of Appeals for the Eighth Circuit, *en banc (Pet. App. A27-A52)*, is reported at 113 F.3d 848.

IV. JURISDICTION

The judgment of the court of appeals was entered on May 14, 1997. The petition for a writ of certiorari was filed on July 15, 1997 and the petition was granted on September 29, 1997. This Court's jurisdiction to consider civil cases in the courts of appeals is invoked pursuant to 28 U.S.C. §1254(1).

V. STATUTORY PROVISION INVOLVED

11 U.S.C. §523(a): A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

VI. STATEMENT OF THE CASE[1]

A. Summary.

Petitioner Margaret Kawaauhau ("Mrs. Kawaauhau") dropped a box on her foot and developed a bacterial infection. (*Pet. App.*

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[1] This statement of fact is taken from the findings of the bankruptcy court. Respondent did not challenge these findings on appeal. For this reason, Petitioners moved to dispense with the printing of a joint appendix; however, at the request of Respondent, a joint appendix has been prepared.

A2). She sought the services of Respondent/Debtor Physician Paul Geiger ("Dr. Geiger") for an infection resulting from this accident. *Id.* If properly treated, the infection would have been of little consequence; however, it spread and resulted in the eventual amputation of Mrs. Kawaauhau's leg because of Dr. Geiger's knowing administration of the incorrect medical care. (*Pet. App. A4*). When Mr. and Mrs. Kawaauhau attempted execution on their state court judgment they had against Dr. Geiger, he filed a petition for relief under Chapter 7 of the Bankruptcy Code seeking a discharge of these debts. (*Pet. App. A7*). The judgment in favor of Mr. and Mrs. Kawaauhau was Dr. Geiger's only substantial debt. *Id.* Mr. and Mrs. Kawaauhau filed an adversary complaint under Bankruptcy Rule 7001 seeking exception of their judgments from discharge under 11 U.S.C. §523(a)(6) as willful and malicious injuries. (*Pet. App. A1*). The bankruptcy court granted the relief sought in that complaint and thus excepted petitioners' claim from respondent's discharge in bankruptcy. (*Pet. App. A1-A17*). The district court affirmed (*Pet. App. A18-A22*), but the court of appeals sitting *en banc* reversed. (*Pet. App. A27-A52*).

B. Statement of Case.

Mrs. Kawaauhau had been a patient of Dr. Geiger in the past and had numerous medical conditions, including diabetes, with which Dr. Geiger was familiar. (*Pet. App. A2*). She sought medical treatment from him due to fever, dizziness and a red swollen leg with pus oozing from under the nail of her large toe which resulted from dropping the box on her right foot. *Id.* Dr. Geiger diagnosed Mrs. Kawaauhau's condition as thrombophlebitis of the right leg, prescribed oral doses of tetracycline in addition to the standard thrombophlebitis treatment and admitted her to the hospital. *Id.* A blood analysis performed after her admission to the hospital displayed a "left shift" in her blood's composition. *Id.* After her first day in the hospital, Mrs. Kawaauhau developed a blister on her right calf.

Id. On January 5, 1983, Dr. Geiger had hospital personnel sample and analyze both tissue from Mrs. Kawaauhau's large toe and fluid from the blister on her leg. *Id.* The analysis of the blister fluid identified Gram positive cocci bacteria in pairs. *Id.* Dr. Geiger asserted that the culture made from Mrs. Kawaauhau's toe tissue suggested that tetracycline was effective against the bacteria in her system. *Id.* Dr. Geiger continued to treat Mrs. Kawaauhau with tetracycline administered orally, except that she was given one dose of vigramycin (I.V. tetracycline) intravenously. (*Pet. App. A3*).

On January 6, 1983, further tests revealed the presence of beta streptococcus bacteria in Mrs. Kawaauhau's system. *Id.* Dr. Geiger continued to treat Mrs. Kawaauhau with tetracycline administered orally.

On January 7, 1983, Dr. Geiger stopped treating Mrs. Kawaauhau with tetracycline and prescribed penicillin for her, to be administered orally. *Id.* Dr. Geiger admitted[2] that he knew that penicillin, administered intravenously, would have been more effective than oral penicillin, but that he prescribed oral penicillin because he claimed that Mrs. Kawaauhau had previously conveyed to him her desire to minimize the cost of her treatment,[3] and he stated that he believed she was absorbing medicine through her stomach well. *Id.*

Dr. Geiger left Mrs. Kawaauhau in the care of other doctors when he left on business on January 8, 1983. *Id.* These doctors

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[2] Dr. Geiger's testimony was admitted into evidence in the bankruptcy court, both in the form of a transcript of the testimony at the state court trial and his own live testimony in bankruptcy court.

[3] The bankruptcy court states:

> . . . Mrs. Kawaauhau denied ever having discussed the cost of treatment with Dr. Geiger. Solomon Kawaauhau, Margaret's husband, testified that he never told Dr. Geiger to keep costs to a minimum in treating Margaret's leg. (*Pet. App. A15, fn 1*).

treated Mrs. Kawaauhau with moxam and penicillin, administered intramuscularly, and because her condition had continued to deteriorate, arranged to fly her to Honolulu where she could receive care from an infectious disease specialist. *Id.* Upon his return on January 11, 1983, Dr. Geiger canceled Mrs. Kawaauhau's transfer to Honolulu because he thought she looked stronger and more alert than when he left her days earlier. *Id.* Also on January 11, 1983, Dr. Geiger inexplicably discontinued giving Mrs. Kawaauhau all antibiotics. *Id.*

Mrs. Kawaauhau did not receive any antibiotics for two days and on January 14, 1983, after further deterioration in the condition of her leg and consultation with surgeons, the decision was made to amputate Mrs. Kawaauhau's leg below the knee. (*Pet App. A4*).

Mr. and Mrs. Kawaauhau sued Dr. Geiger in the Circuit Court for the Third Circuit of Hawaii for injuries based on his treatment of Mrs. Kawaauhau's right leg. *Id.* The Kawaauhaus presented the expert testimony of Dr. Peter Halford, a board certified surgeon, who testified that Dr. Geiger had failed to provide adequate care in his treatment of Mrs. Kawaauhau's leg. Dr. Halford specifically testified that Mrs. Kawaauhau's illness had been mismanaged by misdiagnosis, by administering the wrong antibiotics and then the correct antibiotics via the incorrect route, and finally by discontinuing the entire treatment. (*Pet. App. A5-A7*). As a result of Dr. Geiger's actions, the infection progressed more rapidly and resulted in the amputation of Mrs. Kawaauhau's leg in order to save her life. (*Pet. App. A7*).

Dr. Geiger testified in his own defense at the state court trial and acknowledged that he recognized that, from January 7 to the morning of January 12, the standard of care for Mrs. Kawaauhau was to administer penicillin intravenously for her streptococcus infection. (*Pet. App. A5*).

On March 25, 1987 a jury found Dr. Geiger liable to Mrs. Kawaauhau for the loss of her leg and a judgment was entered in

the Circuit Court of the Third Circuit, State of Hawaii in favor of the Plaintiff Margaret Kawaauhau and against Dr. Geiger as follows: special damages, $203,040.00; general damages, $99,000.00. (*Pet. App. A7*). Judgment was also entered in favor of Plaintiff Solomon Kawaauhau and against Dr. Geiger as follows: general damages for the loss of consortium, $18,000.00; emotional distress, $35,000.00. *Id.* The total judgment entered in favor of the Kawaauhaus and against Dr. Geiger was $355,040.00. *Id.*

Dr. Geiger moved to St. Louis, Missouri and when his wages were garnished by the Kawaauhaus, Dr. Geiger filed for relief under Chapter 7 of the Bankruptcy Code, creating a bankruptcy estate where the only significant creditors were the Kawaauhaus. *Id.* The unsecured non-priority creditors, including the Kawaauhaus, received no distribution from the bankruptcy estate.[4]

The Kawaauhaus filed a complaint in the United States Bankruptcy Court for the Eastern District of Missouri seeking to except their judgment from discharge as a willful and malicious injury under 11 U.S.C. §523(a)(6). (*Pet. App. A1*). The bankruptcy court excepted the judgment from discharge pursuant to 11 U.S.C. §523(a)(6). *Id.* The bankruptcy court held that Dr. Geiger's conduct was malicious for purposes of §523(a)(6) because he knowingly disregarded "acceptable medical practice" and his conduct was certain or substantially certain to cause physical harm. The bankruptcy court also held that Dr. Geiger's conduct "offends even a person lacking formal medical training." (*Pet. App. A14*). Dr. Geiger's egregious errors led to the worsening of Mrs. Kawaauhau's condition, making amputation

[4] The record before the lower court does not include this fact because at the time of the bankruptcy court trial, the bankruptcy trustee had not yet concluded his administration of the estate. Counsel makes this representation based upon the record now in the bankruptcy court. Counsel does not believe this fact is contested.

necessary to save her life. *Id.* The bankruptcy court concluded that Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the accepted level of care that it constituted willful and malicious conduct. (*Pet. App. A17*).

Dr. Geiger then appealed to the United States District Court for the Eastern District of Missouri and that court affirmed the judgment of the bankruptcy court. (*Pet. App. A18-A22*). The district court held that Dr. Geiger knew his treatment was substandard and his treatment was certain or substantially certain to cause Mrs. Kawaauhau harm. (*Pet. App. A22*). The district court upheld the bankruptcy court's finding that Dr. Geiger's conduct was certain or substantially certain to cause physical injury and therefore constituted a willful and malicious injury, thus causing the debt to be non-dischargeable. *Id.*

Dr. Geiger then appealed to the United States Court of Appeals for the Eighth Circuit. The court of appeals, *en banc*, reversed the decision of the district court, holding that "willful" means that the actor must intend the resulting harm and that for a judgment to be non-dischargeable under the relevant statutory provision, it is necessary that it be based on the commission of an intentional tort. (*Pet. App. A36*).

VII. SUMMARY OF ARGUMENT

The Kawaauhaus' judgment should be excepted from discharge because it is for injuries resulting from Dr. Geiger's "willful and malicious" actions. This is not a case of accidental administration of an incorrect remedy. Dr. Geiger made a conscious decision to deliver substandard care and he admits that he intentionally and knowingly administered the care that he selected. Accordingly, his actions were malicious because they constituted "a wrongful act, done intentionally, without just cause or excuse." *Tinker v. Colwell*, 193 U.S. 473, 486 (1904) and a "willful disregard of what [he] [knew] to be his duty." *Tinker*, 193 U.S. at 487.

The Bankruptcy Reform Act of 1978 (the "Code") carried forward in §523(a)(6) the identical language from the Bankruptcy Act of 1898, §17(a)(2) (the "Act"), providing for the exception to discharge of "willful and malicious injuries." 11 U.S.C. §523(a)(6) (1978). This Court's prior judicial interpretation, in *Tinker*, of the words "willful and malicious" is dispositive of the issue here. Reenactment of previous statutory language carries with it the previous judicial interpretation. Accordingly, this Court should interpret the language of 11 U.S.C. §523(a)(6) consistent with its prior interpretation, as set forth in *Tinker*.

Further, discharge of debts was designed to give the "honest but unfortunate" debtor a fresh start. Dr. Geiger is neither, and is not deserving of such sympathy. As this Court has recognized, and 11 U.S.C. §105 requires, principles of equity are paramount in bankruptcy. Elevating the standard of proof this Court established in *Tinker* to require proof of an intent to injure would confound equity and public policy. Accordingly, this Court should find that the Kawaauhaus' judgment is non-dischargeable in Dr. Geiger's bankruptcy.

VIII. ARGUMENT

A. Statutory Provisions Relating to Discharge and Dischargeability.

Title 11 §524 sets forth the basic discharge protections accorded to a debtor who files bankruptcy. Specific details related to discharge under various chapters are set forth in 11 U.S.C. §§727, 944, 1141, 1228 or 1328. Generally, a discharge prohibits the commencement or continuation of efforts to collect or recover any personal liability of the debtor that arose before the bankruptcy. 11 U.S.C. §524(a).

Section 523 of the Code sets forth certain exceptions to the general principle of dischargeability. Such exceptions permit continued enforcement of the debts described in §523(a).

This case involves the dischargeability of the Kawaauhaus' judgment under the exception set forth in §523(a)(6) for willful and malicious injury by the debtor. The issue here is whether Dr. Geiger's actions are willful and malicious resulting in an exception to his discharge, in which case Dr. Geiger will continue to be liable to the Kawaauhaus notwithstanding his bankruptcy.

B. Statutory Construction.

This case turns on the language of 11 U.S.C. §523(a)(6), preventing the discharge of claim "for willful and malicious injury by the debtor to another entity or to the property of another entity." "[T]he starting point in every case involving construction of a statute is the language itself." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986), citing *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). In addition to the language of the statute, consideration should be given to the provision as a whole, its object and the policy. *Kelly*, 479 U.S. at 47, citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986), quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285

(1956) in turn quoting *United States v. Heirs of Boisdore*, 49 U.S. 113 (8 How.) (1850).

Read literally, that language bars a discharge in this case. The language prevents the discharge of a claim for an injury that has two separate features: it must have been intentional and it must have been malicious. The uncontested factual findings of the bankruptcy court establish that Dr. Geiger's conduct satisfies both statutory requirements. First, Dr. Geiger's actions were intentional. This is not a case that involves a slip of the scalpel. This is a case where a doctor made an intentional decision to provide a specific course of treatment that led to serious injury. Second, Dr. Geiger's actions were malicious, in the sense that his conduct reflected "a total disregard for medical standards * * * that offends even a person lacking formal medical training." (*Pet. App. A14-A15*).

1. Under *Tinker*, a Specific Intent to Injure Is Not Required.

As it happens, this is not the first time this Court has considered the intent necessary for a debt to be sufficiently "willful and malicious" to be excepted from discharge in bankruptcy. This Court interpreted the same terms some 90 years ago in *Tinker v. Colwell*, 193 U.S. 473 (1904), where Frederick Tinker asked to except his judgment against Charles Colwell from discharge in Colwell's bankruptcy proceeding. Colwell had seduced Tinker's wife and Tinker had obtained a judgment for criminal conversation. Colwell filed a voluntary petition for relief under the Act in a case where, as here, the bankrupt had only one significant creditor. This Court affirmed the judgment of the Court of Appeals of the State of New York excepting Tinker's judgment from discharge.[5] While the lower court complained of a lack of

[5] The 1898 Act did not have a provision similar to 11 U.S.C. §523(a) for the determination of exceptions to discharge. Bankrupts and creditors generally litigated the discharge issue in state court. *Brown v. Felsen*, 442 U.S. 127, 129 (1979).

record,[6] it can be inferred from this Court's opinion that Colwell was not acquainted with Mr. Tinker when he began his relationship with Mrs. Tinker. Colwell insisted that his actions were not willful and malicious. Justice Peckham, speaking for the Court, addressed the willful and malicious issue:

> There may be cases where the act has been performed without any particular malice towards the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute. The act is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.
>
> In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.
>
> In *Bromage v. Prosser*, 4 Barn. & C. 247 (K.B. 1825), which was an action of slander, Mr. Justice Bayley, among other things, said:
>
> > 'Malice, in common acceptation, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. If I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not. . . .'

[6] *Colwell v. Tinker*, 72 N.Y.S. 505, 507 (1901). "He (Colwell) further represented in his petition that the only debt or demand against him mentioned in his petition in bankruptcy was one arising upon a judgment recovered by the plaintiff in this action."

We cite the case as good definition of the legal meaning of the word malice. The law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the exception mentioned (emphasis added).

Tinker, 193 U.S. at 485-6.

Thus, this Court distinguished the common meaning of the word "malicious" and adopted the "legal meaning" set forth by Justice Bayley. Dr. Geiger's actions were willful and malicious because Dr. Geiger knowingly administered the wrong treatment without just cause or excuse.[7]

This Court in *Tinker* further elaborated on the legal meaning of the term "willful and malicious:"

> "We think a wilful[8] disregard of what one knows to be his duty, an act which is against good morals, and wrongful in

[7] As contrasted with misdiagnosing a condition, unintentionally prescribing the wrong medication or treatment, or making an error of skill during a surgical procedure.

[8] This Court used the spelling "wilful" in *Tinker*. The Act and Code use "willful." Both are accepted spellings. *Random House Dictionary*, 2175 (2nd ed. 1993).

> and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception."

193 U.S. at 487.

Dr. Geiger's actions fit this definition because Dr. Geiger's knowing administration of substandard care was a "willful disregard of what [he] [knew] to be his duty."[9] The lower court erred by not applying the "legal meaning" of these words as defined by this Court.

Since its decision in *Tinker*, this Court has on only two occasions dealt with the willful and malicious exception to discharge issue, in *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916); and in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934). In both cases, this Court affirmed its definition of willful and malicious set forth in *Tinker*.

2. The Reenactment of the Identical Language of the 1898 Act in the 1978 Code Excepting Willful and Malicious Injuries from Discharge Carries with it Previously Articulated Judicial Interpretations.

When the 1978 Code was enacted, Congress reenacted the identical language from §17(a)(2) of the 1898 Act into §523(a)(6) of the Code.[10] This Court has repeatedly held that the 1978 Bankruptcy Code did not "silently" abrogate the judicial interpretation created by courts construing the "old" Act. *Kelly*, 479 U.S. at 43; *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986).

[9] The bankruptcy court found that [Dr. Geiger's] conduct was so far below the accepted level of care that it constitutes willful and malicious conduct. (*Pet. App. A17*).

[10] At the time of the *Tinker* decision the "willful and malicious" exception was located at §17(a)(2); however, at the time of the enactment of the Code the exception was located at §17(a)(8). *Collier on Bankruptcy*, 15th Edition, Vol. A, p. 3-19. *See Tinker*, 193 U.S. at 480.

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The court has followed this rule with particular care in construing the scope of bankruptcy codifications.

Kelly, 479 U.S. at 47, citing *Midlantic Nat'l Bank*, 474 U.S. at 501. *See also Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

Therefore, the definitions articulated by this Court in *Tinker*, discussed below, should have been applied by the lower court.

The lower court maintained that this Court's holding in *Tinker* has been overruled by the Bankruptcy Reform Act of 1978 by virtue of statements in congressional committee reports. Reenactment of a statute with a settled judicial interpretation usually includes such interpretation. *Pierce v. Underwood*, 487 U.S. 552 (1988). This Court noted in its opinion in *Pierce*, the difficulty of showing congressional *intent* when Congress reenacts the same language verbatim. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Id.* at 567. Accordingly, in contrast to the lower court's approach,

> In construing the scope of bankruptcy codifications, this Court has followed the rule that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

Kelly, 479 U.S. at 37, citing *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986).

Furthermore, even if the discussion moved to an analysis of what Congress intended, statements in committee reports are not necessarily indicative of congressional intent.

> It has been argued that legislative history should not be given much weight as the intent of the entire legislative body. Under this line of thought, both legislative reports and individual statements on the floor represent only the intent of single, individual legislators and not the collective

> legislative body. *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Indeed, a quote from Senator Danforth in the WASHINGTON POST supports this view of legislative history. Speaking about tax legislation, the Senator was quoted as saying: "I remember one night literally following one of my colleagues around the floor of the Senate for fear that he would slip something into the Congressional Record, and I would have to slip something else in." WASH. POST, Tues., May 11, 1993, at A4.

James M. Lawniczak, *Did Congress Always Say What It Meant in the Bankruptcy Reform Act of 1994?*, 101 Commercial L. J. 372, 375 n12 (1997).

Generally, it is presumed that Congress acts intentionally and purposely with respect to the enactment of particular language in a statute. *See, BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537 (1994), citing *Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994). Further, when a term of art is used without Congress according it a special definition, that term is accorded its established meaning. *See, McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). In this case, the established meaning was determined in *Tinker* and has been articulated in Prosser and Keaton in the *Law of Torts* §34, at 213 (5th Ed. 1984).

The overall structure of the new Bankruptcy Code makes it particularly unlikely that Congress decided to abandon the prevailing interpretation of the language that it chose without making that intent evident in the language of the statute. Among other things, the Bankruptcy Code includes a massive definitional section that currently sets out specific definitions of more than 60 separate terms. If Congress wanted to adopt a neoteric reading of the terms "willful" and "malicious," it would have included definitions of those words in 11 U.S.C. §101.

3. Without Regard to *Tinker*, the Lower Court's Analysis is Flawed.

The lower court, focusing on the word "willful," inappropriately relied on the legislative history and a comment to the Restatement (Second) of Torts to support its holding. The legislative history *does not* suggest that the word "willful" is intended to modify the resulting injury rather than the act. *Tinker* applied "willful" to the act, not the injury, and subsequent legislative history showed no evidence of any intention to overrule *Tinker* in that regard. *Tinker*, using the willful standard, held that Colwell's act was willful. Dr. Geiger's actions clearly meet that willful standard.

The lower court's analysis of the "willful" prong is flawed even if made without regard to *Tinker*. Without citation of authority the lower court opined that "intentional by itself will almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts, a category that excludes injuries caused by acts that are merely negligent, grossly negligent, or even reckless." (*Pet. App. A33*). The lower court goes on to draw an analogy to a driver who *without looking* turns into oncoming traffic. (*Pet. App. A34*). Obviously, such a driver does not *intend* to turn into oncoming traffic but does so *accidentally*. On the other hand, a driver who *sees* the oncoming traffic and *decides* to turn into it has committed an intentional act and has therefore acted willfully. The dissent below notes that this Court has consistently defined "willful" as applying to a voluntary act. (*Pet. App. A42*). This Court discussed "willful" in a non-bankruptcy case and held that willful is commonly used for "an act which is intentional, knowing, or voluntary, as distinguished from accidental." *United States v. Murdock*, 290 U.S. 389, 394 (1933). *See also, Screws v. United States*, 325 U.S. 91, 101 (1945). "[W]hen used in a criminal statute, it generally means an act done with bad purpose."*Murdock*, 290 U.S. at 394. *See also, Screws*, 325 U.S. at 101.

Dr. Geiger's treatment of Mrs. Kawaauhau was no accident! He stated on the record that he knew the correct care and gave something less effective and different. Dr. Geiger acted intentionally and therefore acted willfully under the *Tinker* and *Murdock* definitions.

The lower court drew support for its analysis from the Restatement (Second) of Torts §8A. Its analysis of the *Restatement*, however, was incomplete. To be sure, the *Restatement* does state that intentional torts ordinarily are limited to actions that result in desired consequences. The lower court omitted to mention, however, that the *Restatement* goes on to state in comment b to that same provision:

> Intent is not ... limited to the consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

Restatement (Second) of Torts §8A, cmt. b (1965).

Application of that rule to the current statute would be entirely consistent with *Tinker*. Thus, the lower court's crabbed view of willful intent is not only inconsistent with this Court's prior analysis of that question, but also with the general principles of modern tort law.

Neither Dr. Geiger nor any court below has cited any evidence of congressional intent to overrule this Court's definition of the word "malicious" and the legal construction given to it by this Court. Accordingly, had the lower court reached the issue of malice it would have been required, applying *Tinker*, to find Dr. Geiger's conduct was malicious.

C. Public Policy Dictates that the Kawaauhaus' Judgment Be Held To Be Non-Dischargeable Pursuant to §523(a)(6).

The proliferation of lawyer advertising[11] and the explosion in bankruptcy filings[12] has impressed upon the citizenry that the idea of filing a bankruptcy petition is analogous to a request for discharge of one's debts. But the concept of forgiveness of debt, while an early biblical concept,[13] is a relatively new concept in bankruptcy. The first Anglo-American statute to grant a discharge did not appear until 1705.[14] Four bankruptcy laws

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[11] This Court first struck down ethical rules restricting lawyer advertising in *In re R.M.J.*, 455 U.S. 191 (1982).

[12] "The remarkable increase in consumer bankruptcy during the past two years is particularly alarming." National Bankruptcy Review Commission Report (October 20, 1997), at iii.

[13] Deuteronomy 15:1 provided for a sabbatical year every seven years in which debt would be forgiven. The five Books of Moses (in Hebrew, "Torah") set down the commandments but had little instruction on implementation. Until the second century this instruction was part of the "oral tradition" and was then reduced to writing by Rabbi Yehudah HaNasi (Judah the Prince) in the Mishnah. In effect, the Mishnah is to the Torah what this Court's opinions as compiled in United States Reports are to the Constitution and federal law. The Mishnah in Shebiit Ch. 10 Mishnah 2 states that a sabbatical year does not release a debt that comes as a result of a court order or certain matters which we might now define as willful and malicious, thus the first "exceptions to discharge." Under the rabbinic interpretation of Deuteronomy, Dr. Geiger's debt would not be discharged. *See*, Jacob Neusner, *The Mishnah: A New Translation*, Yale University Press 91 (1988).

[14] For an exhaustive history of the bankruptcy discharge *see* Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L. J. 325 (1991). The Statute of 4 Anne enacted in 1705 provided a discharge to an "honest and cooperative bankrupt." *Tabb* at 333. The bankrupt had to apply for the discharge. *Id.* The origin of the discharge was primarily to act as a carrot and a stick for the debtors and it was quite a stick—the death penalty to dishonest and/or uncooperative bankrupts. *Tabb* at 336-37.

were enacted by Congress during the 19th century, three of which were short lived and contained varying degrees of discharge protection for the bankrupt[15] and the last of which first contained the exception for willful and malicious injury and remained in effect from 1898 until 1978.[16]

In a society governed by law, the social compact among the citizens and between the government and its citizens gives the courts the duty and power to order compensation of victims. The arguments urged by Dr. Geiger and accepted by the lower court would set a standard where wrongdoers could avoid claims by simply denying that they intended an injury, thus depriving a

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[15] No federal bankruptcy law was enacted until the beginning of the 19th century. The Bankruptcy Act of 1800 followed the theme of the Act of 4 Anne and its English successors which encouraged the bankrupt to work with creditors and required him to apply for a discharge. *Tabb* at 344-45. A series of bankruptcy acts followed the Act of 1800 but each was repealed shortly after enactment resulting in many years when there was no federal bankruptcy law. *Tabb* at 349-362. Each act contributed to the development of bankruptcy law in this country and had changes which included the concept of voluntary filings, allowance of non-merchant debtors, "preferential transfers" ("preference" refers to the transfer of debtor's assets prior to bankruptcy which results in one creditor being preferred over other creditors. 11 U.S.C. §547) as a basis for denial of discharge, and requiring creditors to take affirmative action to object to a bankrupt's discharge (note that "Bankrupts"are now more euphemistically referred to as "Debtors." 11 U.S.C. §101(13)).

[16] The list of exceptions to discharge grew but none explicitly excepted "willful and malicious injuries" until the Bankruptcy Act of 1898 in §17(a)(2). *Tabb* at 368 n342. In 1903 before this Court's decision in *Tinker*, the Act was amended to provide for an exception for criminal conversation. This Court's decision in *Tinker* was not based on that exception, which was not in effect at the time of Mr. Colwell's dalliance. The exception for criminal conversation remained in the Act from 1903 until its repeal in 1978. The criminal conversation exception was not reenacted in the 1978 Code. The exception for willful and malicious injuries remained in the 1898 Act until its repeal in 1978 and was reenacted in §523(a)(6) of the 1978 Code using the same language. *Tabb* at 368.

victim of an essential element of proof. This very restrictive interpretation would eviscerate §523(a)(6) of the Code and provide a shield for an entire category of debts which has not been contemplated by Congress in the Code.

The United States Court of Appeals for the Fourth Circuit noted this when it affirmed the decision of lower courts excepting a claim from discharge as a willful and malicious injury against a debtor who used the proceeds of business collateral to purchase personal luxury items:

> . . . To require specific malice or some other strict standard of malice for non-dischargeability of a debt under the Bankruptcy Code would undermine the purposes of that provision and place "a nearly impossible burden" on a creditor who wishes to show that a debtor intended to do him harm (citations omitted). To require such specific malice would restrict Sec. 523(a)(6) to the small set of cases where the debtor was foolhardy enough to make some plainly malevolent utterance expressing his intent to injure his creditor.

St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1009-1010 (4th Cir. 1985).

A recent case in the Fifth Circuit further demonstrates the potential injustice that may result from adopting the standard proposed by Dr. Geiger and articulated by the lower court. In that case a debtor carrying a loaded double-barreled, sawed off shotgun approached a car in his driveway, containing a passenger with whom he had a dispute. He tapped on the windshield twice and the gun went off, striking the passenger in the face and causing severe injury. *In Re Delaney*, 190 B.R. 77 (Bankr. W.D. La. 1995).

The bankruptcy court excepted the injury from the debtor's discharge. *Id.* The court held that an injury to a person is

"malicious" if it is wrongful and without just cause or excuse and "willful" if the debtor intentionally does an act which necessarily leads to injury, citing *Chrysler Credit Corp. v. Perry Chrysler Plymouth*, 783 F.2d 480 (5th Cir. 1986). The court held:

> It is beyond peradventure that loading a twelve gauge, double barreled, sawed-off shotgun and pointing it toward the face of another unarmed person or against a windshield just beyond the face is wrongful and without just cause. The facts also support a finding that the acts were deliberate, intentional and led to the plaintiff's injuries. The debtor systematically went to his room and loaded the gun. He briefly put it down when reprimanded by his father. Even after his father advised him to relinquish it, he again picked up the weapon, put his finger on the trigger and headed outside to confront the plaintiff.

In Re Delaney, 190 B.R. at 82-83.

However, on appeal the district court reversed, reading the record differently:

> Our reading of the record leads to a finding that the weapon discharge was inadvertent, unintended, and totally accidental. We are driven to that conclusion for many reasons, including the trial testimony of David Delaney at page 322; the trial testimony of William Mayers at page 51; and the deposition testimony of the victim himself at pages 34, 42, and 60. We are particularly interested in the victim's assertion that Mr. Delaney "tapped twice to get my attention, I guess to get my attention." page 60.

Delaney v. Corley, 185 B.R. 521, 523 (W.D. La. 1995).

The Fifth Circuit in *Matter of Delaney*, 97 F.3d 800 (5th Cir. 1996), affirmed the district court's reversal of the bankruptcy court decision primarily because the maimed victim was unable

to provide the key element of proof, an element only the perpetrator could provide . . . an admission of intent.

A case which provides further support for the policy enunciated by Mr. and Mrs. Kawaauhau is *In Re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987), *aff'd* 100 B.R. 477 (W.D. Mo. 1988) *rev'd* 869 F.2d 394 (8th Cir. 1989), *vacated* 874 F.2d. 1254 (8th Cir. 1989) (*en banc*). In *Hartley*, the employer sent an employee into the basement to clean used tires with gasoline. As a joke, he threw a firecracker down into the basement to startle the employee. The firecracker ignited the fumes and caused terrible injuries to the employee who took exception to the employer's discharge in bankruptcy. The *Hartley* case is instructive, and unlike the *Delaney* case in which animus could be implied by the disagreement between Delaney and Corley, no ill will was evident between Hartley and his employee. The bankruptcy court excepted the judgment from discharge as a willful and malicious injury, offering an analysis of the policy reasons for denying discharge:

> The final reason that this Court concludes plaintiff's claim against defendant is not dischargeable is probably more philosophical than legal. Basically, certain acts, no matter how intentioned, are too dangerous and too harmful to ever be discharged in bankruptcy. Our social fabric requires certain limits and constraints on each one of us who constitute the woof and warp of that fabric. Without those limits and those constraints, we become a true anarchy. Mr. Justice Holmes perhaps expressed it best when he said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Although it is only distantly analogous, the absolute danger of harm to others by an act of a debtor should be

> a consideration by the Court in ruling [on] §523(a)(6) questions.

In Re Hartley, 75 B.R. 165, 168 (Bankr. W.D. Mo. 1987).[17]

To borrow the *Hartley* court's words, our social fabric requires certain limits. Surely, an unfortunate but honest debtor, even a physician who has made an honest mistake, ought not to spend his life in indentured servitude for a simple error. But some actions like those of Dr. Geiger whose treatment of Mrs. Kawaauhau was found by the bankruptcy court to "offend[s] even a person lacking formal medical training" are beyond those limits. To affirm the judgment of the lower court would be to forgive acts which go beyond these limits. The hurdle erected by the lower court is so high that few, if any, unfortunate victims, no matter how egregious the act, could surmount it.

The Petitioners' case finds support in long standing principles of bankruptcy espoused by this Court:

> There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction. Section 2a, 52 Stat. 842, 11 U.S.C. §11(a); *Pepper v. Litton*, 308 U.S. 295 (1939).

Bank of Marin v. England, 385 U.S. 99, 103 (1966).

Furthermore, the "discharge," which we have seen was only a recent addition to American bankruptcy law, is not a free pass for the sloppy, reckless or those that disregard their duty, but a fresh start for the honest and unfortunate debtor:

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[17] The ruling was affirmed by the district court but reversed by a panel of the Eighth Circuit. The panel decision then was vacated by the grant of a petition for rehearing *en banc*. The bankruptcy court and the district court's decisions were then affirmed when the circuit court *en banc* failed to reach an opinion by an evenly divided vote in *In Re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987), 100 B.R. 477 (W.D. Mo. 1988), 869 F.2d 394 (8th Cir. 1989), 874 F.2d 1264 (8th Cir. 1989) (*en banc*).

> One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' *Williams v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 554-555 (1915). This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. *Stellwagen v. Clum*, 245 U.S. 605, 617.

Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

As the dissent points out below, the Kawaauhaus, not Dr. Geiger, are the unfortunate but honest parties to this dispute. (*Pet. App. A50*). It would be perverse to use the discharge to further harm them.

IX. CONCLUSION

Petitioners are reminded of the story of an American tourist in Paris wanting refreshment on a hot summer day and trying to communicate this desire by slowly and repeatedly mouthing the words, "I want some 'Iiice——— Cr—eeeam,'" as if the sound of these English words had an intrinsic meaning established at creation which would readily become apparent to any listener as long as they were said slowly and often enough.[18] Disregarding for the moment the years of litigation, the suffering of the Kawaauhaus, and the evasive actions of Dr. Geiger to avoid compensating a patient whom he injured, the positions of the parties in this case can be reduced to two simple statements:

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[18] T.K. Stretton, *A Lesson in Language* (unpublished), Cheltenham H.S. 1965.

Dr. Geiger, like the tourist who failed to understand that the sounds used to represent words are mere symbols without intrinsic meaning, hopes that if he says the word "malicious" enough and with sufficient vehemence, this Court will grant him forgiveness because of its *sound.*[19]

The Kawaauhaus, who understand that words have no meaning unless they are given one, know that the words "willful and malicious" mean what this Court says they mean and "neither more nor less"[20] irrespective of their sound. The Kawaauhaus' ask that this Court hold Dr. Geiger responsible because of the *meaning* this Court has given to these words, a meaning which has stood undisturbed through ten decades of this Court's rulings and congressional legislation.

For the reasons set out above, Petitioners ask that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit and affirm the decisions of the United States District Court which affirmed the decision of the United States Bankruptcy Court, thus excepting the Kawaauhaus' judgment from discharge.

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[19] Dr. Geiger's position does have some support in the *naturalist view* deriving largely from teachings of Plato which maintained that there was an intrinsic connection between sound and sense. On the other hand is the *conventionalist view*, largely Aristotelian, that this connection is purely arbitrary. *The Cambridge Encyclopedia of Language*, Cambridge University Press 101 (1987).

[20] "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean-neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master—that's all.'" Lewis Carroll, *Through the Looking Glass And What Alice Found There*, 66 (University of California Press ed., Pennyroyal Press 1983) (1871).

Here, this Court is the master and has spoken.

Respectfully submitted,

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No. 97-115

In The

Supreme Court of the United States

October Term, 1997

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,

Petitioners,

vs.

PAUL W. GEIGER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Dr. Paul Geiger, the Respondent/Debtor ("Dr. Geiger"), served as Mrs. Margaret Kawaauhau's physician for approximately 5 years, from 1977 until 1983. (Pet. App. A-2). (Mrs. Kawaauhau is hereinafter referred to as "Petitioner," both individually and collectively with her husband, Solomon Kawaauhau). During that time, Dr. Geiger treated Petitioner for a variety of ailments, including diabetes, obesity, hypertension, chronic obstructive pulmonary disease and congestive heart failure. (App. 5).[1]

Prior to the incident in question, Dr. Geiger had hospitalized Petitioner on two other occasions, when she was close to death. *Id.* She improved both times and was released. *Id.* During these two previous hospitalizations, as well as on other occasions, Petitioner expressed concerns to Dr. Geiger about the cost of medical care. (App. 6 & 7). Petitioner specifically complained about the cost of medication that Dr. Geiger had prescribed for her. (App. 6 & 7). In addition to the two previous hospitalizations by Dr. Geiger, Petitioner had been hospitalized at least 16 other times, leading to overwhelming medical expenses. (Rec. Tr. 31). Furthermore, Petitioner was unable to obtain any financial assistance to help with these overwhelming medical bills. *Id.*

On or about January 4, 1983, Petitioner sought medical attention from Dr. Geiger after dropping a box on her right foot.

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1. "App." refers to the Joint Appendix submitted to this court.

"Pet. App." refers to the Appendix to the Petition for Certiorari filed by the Petitioners.

"Rec. Tr." refers to the Trial Transcript of the United States Bankruptcy Court found in the Record.

"Rec." refers to the United States District Court Record which is part of the record filed with this Court.

(Pet. App. A-2). During this visit, Petitioner complained to Dr. Geiger of having had chills and a 102° fever the day before. (Pet. App. A-2). She also mentioned that her right leg had some jerking and that the calf was now tender. (Pet. App. A-2). At that time, Dr. Geiger conducted a physical examination of the Petitioner. Dr. Geiger noted that her right calf was painful with some tenderness present. (Pet. App. A-2). Her right large toenail was loose with puss coming from beneath it. *Id.* At this initial visit, Dr. Geiger immediately advised Petitioner that she should be hospitalized. (App. 10). Petitioner responded that she did not want to be admitted to the hospital, but agreed to go only if Dr. Geiger promised to keep costs to a minimum. (App. 10-11).

When Petitioner finally agreed to be hospitalized, Dr. Geiger instituted a two-prong treatment due to her extremely delicate cardiopulmonary condition. (App. 12). One prong of the treatment was to administer anticoagulants to prevent further clot formation on the leg and the second prong was to administer antibiotics to treat the infection. (App. 12). Due to the severity of her condition, Dr. Geiger immediately administered Heparin, which is a very fast acting anticoagulant. *Id.* Dr. Geiger also administered Coumadin, which is a slower acting anticoagulant which was less expensive. *Id.* Because of the cost constraints imposed by Petitioner, Dr. Geiger only gave her enough Heparin to carry her through until the Coumadin could take over treatment. *Id.*

Regarding the second prong of treatment, Dr. Geiger immediately administered Tetracycline. (Pet. App. A-2). Dr. Geiger also immediately took cultures from both her big toe and the blister that had developed over her calf. *Id.* Dr. Geiger ordered sensitivity tests on these cultures to determine whether the Tetracycline was effective against the infection. *Id.* According to the test, the Tetracycline was very effective in

combating the infection in Petitioner's leg. *Id.* Based upon the results of these tests, Dr. Geiger continued to administer Tetracycline to fight the infection. (Pet. App. A-3). Furthermore, the medical reference books used by Dr. Geiger (*Goodman & Gilman* and *Physician's Desk Reference Book*) confirmed that Dr. Geiger was correct to administer Tetracycline to fight the leg infection. (App. 29).

After approximately three days in the hospital, Petitioner's blood pressure dropped. (Rec. Tr. 43). In order to respond to the lower blood pressure, Dr. Geiger administered an intravenous dose of Vibramycin, which is a form of Tetracycline. (App. 15). At this time, Petitioner questioned Dr. Geiger regarding the cost of the Vibramycin (which was $27), and admonished Dr. Geiger that she could not afford this type of treatment. (App. 17). Because of the Petitioner's past medical problems, treatment was very difficult. Of particular concern to Dr. Geiger was the fact that the antibiotics which were being administered to fight the infection also had the effect of thinning the Petitioner's blood stream. (App. 16). In order to determine the status of the blood thinning in the Petitioner's blood stream, tests needed to be performed. *Id.* The Petitioner refused to let Dr. Geiger perform these tests, for the reason that she could not afford them. (App. 17). Although Dr. Geiger informed her that she needed these tests, she absolutely refused them. *Id.*

On January 7, 1983, since the infection in the leg had not healed, Dr. Geiger stopped treating Petitioner with Tetracycline and prescribed Penicillin to be administered orally. (Pet. App. A-3). Although Dr. Geiger could have ordered intravenous Penicillin to be administered, he made the decision to limit the Penicillin to oral dosages for two reasons: (1) tests showed the Petitioner had a gastrointestinal tract that absorbed oral doses of medicine very well; and (2) intravenous Penicillin would have cost $40 per day as opposed to $4 per day.

(Pet. App. A-3 & A-5). Dr. Geiger specifically asked the pharmacist about the price difference between oral and intravenous Penicillin based upon the specific financial constraints and directions of the Petitioner. (App. 17).

Dr. Geiger left Petitioner in the care of other doctors while he was away on business on January 8, 1983. (App. 18-19). These doctors administered Penicillin intramuscularly, and because her condition had continued to deteriorate, arranged to fly her to Honolulu where she could receive care from an infectious disease specialist. (App. 3). Upon returning home, Dr. Geiger immediately visited Petitioner and reviewed her medical records. (App. 20). Dr. Geiger observed that the infection in Petitioner's leg had burned itself out. (Pet. App. A-3). Dr. Geiger took a sputum culture from the Petitioner, and determined that the Petitioner had developed a superinfection as a result of administration of the antibiotics. (Pet. App. A-3 and App. 20). Furthermore, Dr. Geiger determined that as a result of administering the antibiotics, Petitioner's blood had become dangerously thin, and there was a risk that the Petitioner would bleed to death or would have a cerebral hemorrhage. (Pet. App. A-3 & App. 21). Therefore, Dr. Geiger made a decision to stop all antibiotics. (Pet. App. A-3). Thereafter, the Petitioner's condition deteriorated and Dr. Geiger consulted with a surgeon, who recommended that Petitioner's leg be amputated below the knee. (Pet. App. A-4).

Petitioner sued Dr. Geiger in the Circuit Court for the Third Judicial Circuit of Hawaii for medical malpractice based upon his treatment of Petitioner's right leg. (Pet. App. A-4). At the state court trial, Petitioner presented the expert testimony of Dr. Peter Halford. *Id.* Dr. Halford testified that Dr. Geiger had failed to provide adequate care in his treatment of Petitioner's leg when he:

(a) failed to diagnose Petitioner's condition as an infection by the second day of hospitalization;

(b) administered Tetracycline to Petitioner because it is not a very effective antibiotic and poses a risk to people like Petitioner who have kidney problems;

(c) failed to administer Penicillin on January 5, 1983, the day the lab identified the bacteria in Petitioner;

(d) prescribed oral does of Penicillin rather than intravenous Penicillin;

(e) discontinued administering antibiotics to Petitioner on January 11, 1983; and

(f) canceled Petitioner's transfer to Honolulu. (Pet. App. A-4).

Dr. Geiger testified in his own defense and acknowledged that he recognized that, from January 7 to the morning of January 12, the standard of care for Petitioner was Penicillin by intravenous route for her streptococcus infection. He said such treatment was the best, ". . . but sometimes we're not permitted to give the best." (Pet. App. A-5). He insisted that the Petitioner complained that medical expenses were too high and she wanted to keep the cost down. (Pet. App. A-5 and App. 10, 11, 12, 16, 17, 26). Based on her complaints and instructions he used oral Penicillin, which cost $4 per day, in contrast with intravenous Penicillin that costs $40 per day. (Pet. App. A-5). Dr. Geiger also believed that Petitioner was absorbing the oral medicine through her stomach well enough to effect a cure. (Pet. App. A-3). Nothing in the record suggests that Dr. Geiger desired to cause the injuries suffered by the Petitioner. (Pet. App. A-34). Nothing in the record suggests that prescribing intravenous

Penicillin would have definitely saved the Petitioner's leg from such an advanced infection.

The Petitioners filed a Complaint in Hawaii in 1985 in which they alleged that Dr. Geiger had negligently treated Mrs. Kawaauhau. (Pet. App. A-31). The Petitioner also sought punitive damages by alleging that Dr. Geiger had treated Mrs. Kawaauhau with a "wanton disregard for her health, safety and welfare." (Rec. 1, 136). The jury did not award the Petitioner any punitive damages and found Petitioner 10% at fault. (Rec. 1, 142). Judgment was entered in favor of Mrs. Kawaauhau and against Dr. Geiger as follows: special damages, $203,040; general damages, $99,000. (Pet. App. A-7). Judgment was also entered in favor of her husband, Solomon Kawaauhau and against Dr. Geiger as follows: general damages for the loss of consortium, $18,000; emotional distress, $35,000. (*Id.*).

Dr. Geiger eventually moved to Missouri, the only other state where he was licensed to practice medicine. (App. 27). On March 16, 1989, Dr. Geiger filed his voluntary petition seeking protection under Chapter 7 of the Bankruptcy Code. (Pet. App. 7). Petitioner filed an adversary complaint in the Bankruptcy Court seeking to deny discharge of the above-referenced debts alleging that the debt was the result of a willful and malicious injury under 11 U.S.C. § 523(a)(6). (Pet. App. A-1).

Trial was held on the merits in the United States Bankruptcy Court on September 6, 1990. Petitioner's sole source of evidence at trial were transcripts from the state court trial and the deposition of their expert, Dr. Peter Halford. (Pet. App. A-28-30). No witnesses were presented by Petitioner. (Pet. App. A-38). Dr. Geiger testified in his own defense at the trial. (Pet. App. A-38).

On August 23, 1994, United States Bankruptcy Judge David P. McDonald entered his memorandum opinion and order, finding that the damage awards issued in the state court medical malpractice action against Dr. Geiger were non-dischargeable under 11 U.S.C. § 523(a)(6). Judge McDonald noted five decisions made by Dr. Geiger which, Dr. Halford believed constituted substandard care. (Pet. App. A-13). He then determined that "Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." (Pet. App. A-13).

On September 2, 1994, Dr. Geiger filed his Notice of Appeal of the bankruptcy court decision with the United States District Court for the Eastern District of Missouri. After submission of briefs by both Appellant and Appellees, the District Court entered an order on October 11, 1995, affirming the Bankruptcy Court's order. (Pet. App. A-18-22).

On October 30, 1995, Dr. Geiger filed his Notice of Appeal of the District Court decision with the United States Court of Appeals for the Eighth Circuit. (Pet. App. A-23). The Eighth Circuit reversed the decision of the District Court citing a previous decision in which the Circuit Court expressed the belief that Congress intended "to allow discharge of liability for injuries unless the debtor intentionally inflicted an injury." (Pet. App. A-25). The Court concluded that the bankruptcy court erred because Dr. Geiger was at the very least negligent and at the worst reckless. (Pet. App. A-34 & 35). A rehearing *en banc* was granted and the United States Court of Appeals, *en banc*, reversed the decision of the District Court, holding that for a judgment debt to be nondischargeable, it must be based on the commission of an intentional tort. (Pet. App. A-36). This Court granted the Petition for Certiorari on September 29, 1997.

SUMMARY OF THE ARGUMENT

The debt owed to the Petitioners as a result of the medical malpractice judgment should be discharged under 11 U.S.C. § 523(a)(6) due to the fact that Dr. Geiger did not intend to injure the Petitioner. The plain meaning of 11 U.S.C. § 523(a)(6) requires both a willful injury and a malicious injury in order for a debt to be nondischargeable. A willful injury is the result of an act done with the intent to cause injury. Malice has been defined as a wrongful act, done intentionally without just cause or excuse, which necessarily results in injury.

Dr. Geiger made a decision to administer a course of treatment to the Petitioner. His decision was based on a review of repeated test results, patient medical history and financial constraints placed on him by the Petitioner. Throughout the course of his treatment, Dr. Geiger believed the prescribed treatment was curing the Petitioner.

The Eighth Circuit reviewed the facts as found by the Bankruptcy Court and determined that Dr. Geiger had no intent to injure the Petitioner and that his conduct was at worst reckless. Debts which are caused as the result of reckless conduct are dischargeable under § 523(a)(6). Congress specifically overruled the application of the reckless disregard standard in the legislative history of this statute. Both Houses of Congress stated that to the extent that *Tinker v. Colwell*, 193 U.S. 473 (1904) held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard standard," they are overruled. Thus, injuries which are the result of reckless conduct are dischargeable. The *Tinker* case is further limited by its facts.

The Eighth Circuit's interpretation of willful injury as requiring an intent to cause an injury is well founded in the

overall policy of providing debtors with a fresh start. It is also the natural way to define the statute. An alternative construction of requiring only an intentional act which results in injury would cause virtually every voluntary act to be nondischargeable if an injury resulted.

Discharge of debts was designed to give "the honest but unfortunate" debtor a fresh start. Nothing in the record suggests that Dr. Geiger was anything but honest. His treatment was motivated by his desire to cure the Petitioner's infection. Since the Petitioners have not satisfied the first prong of the statute by establishing a willful injury, this Court should find that the debt is dischargeable.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS WAS CORRECT IN REVERSING THE JUDGMENT OF THE DISTRICT COURT BECAUSE THE DEBT WAS NOT THE RESULT OF AN INTENTIONAL INJURY.

The issue before this Court is whether a judgment debt resulting from a medical malpractice action is dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(6). This section prohibits the discharge in bankruptcy of all debts incurred because of the "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The interpretation of this statute has caused a multitude of litigation which has resulted in a split of authority regarding the test to be employed in defining the phrase "willful and malicious injury."

The Petitioner, Margaret Kawaauhau, sought treatment from Dr. Geiger after she injured her foot. (Pet. App. A-2). Dr. Geiger

admitted the Petitioner to the hospital and prescribed oral tetracycline. *Id.* He later prescribed oral penicillin for the patient. *Id.* Throughout his treatment of the Petitioner, Dr. Geiger examined the Petitioner daily, performed repeated tests and believed the Petitioner's condition was improving. (Pet. App. A-2 & A-5). Unfortunately, the Petitioner's condition deteriorated and her leg had to be amputated below the knee. (Pet. App. A-4). At the state court malpractice action, the Petitioner introduced into evidence the deposition of Dr. Peter Halford, a physician hired to give an expert opinion regarding Dr. Geiger's treatment. *Id.* He determined that Dr. Geiger's treatment of the Petitioner was negligent. (Pet. App. A-29). Dr. Geiger stated in his own defense that he believed the Petitioner had a gastrointestinal tract that absorbed oral medication very well. (Pet. App. A-3). He also stated that he had prescribed less expensive antibiotics because the Petitioner had complained the medical expenses were too high and she wanted to keep the cost down. (Pet. App. A-5). The Petitioner argued at the bankruptcy trial that Dr. Geiger acted willfully and maliciously by his "intentional substandard care of the Petitioner." (Pet. App. A-29).

The Eighth Circuit stated that Dr. Geiger's conduct was at worst reckless. (Pet. App. A-35). Based on the Eighth Circuit's analysis of what constitutes a willful injury, under 11 U.S.C. § 523(a)(6), Dr. Geiger would have had to commit an act with the intent to cause an injury. (Pet. App. A-33-35). After a thorough review of the record, the Eighth Circuit concluded that there was no suggestion whatsoever that Dr. Geiger desired to cause the serious consequences to the Petitioner. (Pet. App. A-34).

A. The Decision Of The Eighth Circuit Is Supported By The Plain Meaning Of 11 U.S.C. § 523(a)(6).

The starting point in interpreting a statute is its language, for "if the intent of Congress is clear, that is the end of the matter." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 113 S. Ct. 2151, 2157 (1993); *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984). The language of the statute in this case, 11 U.S.C. § 523(a)(6) is as follows:

> (a) A discharge under Section 727, 1141 or 1328(b) of this title does not discharge an individual debtor from any debt . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

The adjectives "willful" and "malicious" both modify "injury" in the above-referenced statute. *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985). A plain reading of the statute would thus require both a willful injury and a malicious injury in order for a debt to be excepted from discharge under 11 U.S.C. § 523(a)(6).

Willful has been defined as "deliberate or intentional." *See* S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, and H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963. A willful injury must therefore be an act done to intentionally or to deliberately injure someone. The statute does not add the words "a willful act which results in injury." Rather, the statute expressly and clearly requires a willful injury. As stated by the Eighth Circuit, the more natural reading of willful injury should be "intent to cause injury." (Pet. App. A-33). Nothing in the record suggests that Dr. Geiger intentionally or deliberately injured the Petitioner. (Pet. App. A-34). His actions were designed solely to heal his patient.

Malice has been defined as a wrongful act, done intentionally without just cause or excuse. *Blacks Law Dictionary*, abridged Sixth Edition, 1991; *Tinker v. Colwell*, 193 U.S. 473, 24 S. Ct. 505, 48 L. Ed. 754 (1904). *Webster's New Dictionary* (1989) defines malice as an intention to harm another. Once again, an intentional injury is required. No action taken by Dr. Geiger had the requisite intent to injure the Petitioner. (Pet. App. A-34). Even if it can be argued that Dr. Geiger intentionally chose a course of treatment that did not comply with a known standard of care, it cannot be said that his actions were without just cause or excuse or that he intended to injure Petitioner. Each course of treatment that he chose was based upon repeated test results, patient history and daily patient observation. (Pet. App. A-2, A-3 & A-5). Even when Dr. Geiger chose oral penicillin over intravenous penicillin, his decision was based upon the belief that Mrs. Kawaauhau was absorbing medicine through her stomach well enough to effect a cure. (Pet. App. A-34).

The definition of willful appears to be included in or duplicated by the definition of malicious since both require intent. It is a rule of statutory construction that courts should give effect to each word in the statute. *See* 2A Sutherland Statutory Construction § 46.06 (5th ed. 1992) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.") Thus, it appears that a plain reading of the statute emphasizes an intentional injury (*i.e.*, an act with intent to injure) as opposed to simply an intentional act which results in injury.

In the following excerpt from the Eighth Circuit Opinion, the court states that to choose a statutory construction which focuses on an intentional act rather than on an intentional injury would render virtually all tort judgments exempt from discharge:

> Every act that is not literally compelled by the physical act of another (as when someone seizes my arm and causes it to strike another), or the result of an involuntary muscle spasm, is a "deliberate or intentional" one, and if it leads to injury, a judgment debt predicated on it would be immune from discharge under the alternative construction of the statute that is posed in *Perkins*.

(Pet. App. A-33, 34). Surely, Congress did not intend for every intentional act to be nondischargeable. The mere act of intentionally purchasing an item on credit and later not paying for the purchase would be an intentional injury under that theory. Other examples would be an attorney's decision to try a case a certain way or an accountant's decision to classify a deduction a certain way. If the client is injured as a result of these decisions, it would be an intentional injury under this analysis.

The Eighth Circuit supported its analysis by defining intent pursuant to the Restatement (Second) of Torts (hereinafter referred to as the "Restatement") § 8A which states that unless "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it," he has not committed an intentional tort. (Pet. App. A-34).

Once again, nothing in the record suggests that Dr. Geiger desired to cause the ultimate consequences of his treatment or that he believed his treatment of Petitioner was substantially certain to result in the loss of her leg. On the contrary, the record reflects that Dr. Geiger believed his course of treatment was effectively curing the Petitioner. (Pet. App. A-34).

The Petitioner argues that the Eighth Circuit's analysis is flawed and cites to Comment b of the Restatement which states:

> Intent is not . . . limited to the consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

No evidence was produced which indicated Dr. Geiger knew that the consequences of his treatment were certain or substantially certain to result in injury. Likewise, no evidence was produced which indicated another course of treatment would have caused any different consequences. Dr. Geiger testified that he knew the standard of care and chose a different course of treatment. The evidence proves that at all times Dr. Geiger, within the constraints demanded by Petitioner, took every step he knew of to protect Petitioner's health. (Pet. App. A-3 & A-34).

Petitioner states that a "literal reading" of the statute bars discharge. However, Petitioner fails to cite any support as to how Petitioner derived the "literal" definition of willful and malicious injury, but rather the Petitioner conclusively defines the terms. As set forth above, the plain meaning of the statute supports the Eighth Circuit's decision.

B. The Decision Of The Eighth Circuit Is Supported By The Legislative History Of The Statute.

An exception to discharge for "willful and malicious injury" has been in effect since 1898.[2] In 1904, the United States

2. The present 11 U.S.C. § 523(a)(6) has been in effect since October 1, 1979, the date upon which the Bankruptcy Reform Act of 1978 superseded the Bankruptcy Act of 1898. Former 11 U.S.C. § 35(a)(8) contained a *similar* provision to 11 U.S.C. § 523(a)(6). Section 17(a)(2), of the 1898 Act excepted from discharge debts for "willful and malicious injuries to the person or property of another." Act of July 1, 1898, ch. 541, §17(a)(2), 30 Stat. 544, 550, repealed by Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1979).

Supreme Court in *Tinker v. Colwell*, 193 U.S. 473 (1904), interpreted this statutory phrase. The Court defined willful as intentional and voluntary. *Id.* at 486. The Court defined malice in its legal sense to mean "a wrongful act, done intentionally, without just cause or excuse." *Id.* at 486. Malice, in law, simply means an injurious act committed in disregard of the rights of another. *Id.* at 486-487.

When Congress repealed the Bankruptcy Act of 1898 and replaced it with the Bankruptcy Reform Act of 1978, it expressly overruled *Tinker*. Reports from both houses of Congress included the following direction:

> Under this paragraph, "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell* held that a looser standard is intended and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

H.R. Rep. No. 95-595 at 365 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320-21; S. Rep. No. 95-989 at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5864. Collier notes the same fact:

> The "reckless disregard" standard and the cases that uphold that standard in construing section 17(a)(2) of the Bankruptcy Act are not applicable in interpreting section 523(a)(6).

3 Collier on Bankruptcy ¶ 523.16(3) (15th ed. 1979).

The Restatement (Second) of Torts § 500 defines "reckless disregard" as follows:

> an actor does an act or intentionally fails to do an act which it is his duty to the other to do, knowing

> or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (1963-1964). The Comment to § 500 of the Restatement states that recklessness may consist of either of two types of conduct. *Id.* In one, the actor knows or has reason to know facts which create a high degree of risk of injury to another but deliberately proceeds to act in conscious disregard of that risk. *Id.* In the other, the actor has such knowledge or reason to know of facts, but does not realize the high degree of risk involved. *Id.*

The Eighth Circuit stated that the worst that could possibly be said of Dr. Geiger's conduct in prescribing less expensive antibiotics that may not have been as effective as expensive antibiotics, or in discontinuing antibiotics when he thought the infection had run its course, was that he acted recklessly. (Pet. App. A-35). Pursuant to the legislative history, such conduct should be dischargeable.

The Congressional intent to discharge reckless conduct under 11 U.S.C. § 523(a)(6) was further enunciated in the creation of 11 U.S.C. § 523(a)(9) which bars the discharge of debts caused by operating a vehicle while under the influence of a substance. 11 U.S.C. § 523(a)(9). Senator DeConcini, the proponent of the amendment stated,

> I have an amendment that would *change the standard* and would not permit discharge in bankruptcy of obligations arising from the infliction of willful, wanton, or reckless injury. Today there exists in the

> bankruptcy statute an *unconscionable loophole* which makes it possible for drunk drivers or others who have acted with willful, wanton, or reckless conduct and who have injured, killed, or caused property damage to others to escape civil liability for their actions by having their judgment debt discharged in Federal bankruptcy court. This loophole affords opportunity for scandalous abuse.

(Emphasis added) Cong. Rec. S. 5326 (daily ed. Apr. 27, 1983). It can be implied from Senator DeConcini's remarks that reckless conduct is currently dischargeable under 11 U.S.C. § 523(a)(6). If it were not dischargeable, there would be no loophole. Rather than amend § 523(a)(6) to close the "loophole" for reckless conduct, Congress created a new exception to discharge. If Congress had intended that reckless conduct would not be dischargeable under § 523(a)(6), the new statute, § 523(a)(9), would not have been necessary. Congress could have simply amended § 523(a)(6). Congress chose not to amend 11 U.S.C. § 523(a)(6) leaving reckless conduct dischargeable under this statute.

The Petitioners cite *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537 (1994), for the presumption that Congress acts intentionally and purposely with respect to the enactment of particular language in a statute. *BFP* involved the rules of interpretation that are employed when Congress includes particular language in one section of a statute but omits it in another. *Id.* at 537. The specific need for 11 U.S.C. § 523(a)(9) to hold certain reckless conduct nondischargeable evidences the intent of Congress to discharge reckless conduct generally under § 523(a)(6).

The plain meaning of legislation should be conclusive except in the rare cases in which literal application of the statute

will produce results demonstrably at odds with the intention of its drafters. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S. Ct. 1026 (1989). In such cases, the intention of the drafters, rather than strict language, controls. *Id.* Congressional intent was expressed in the legislative history of both Houses of Congress in enacting the 1978 Code revisions. H. R. Rep. No. 95-595 at 365 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320-21; S. Rep. No. 95-989 at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5864. Both houses specifically referred to *Tinker* and specifically overruled the reckless disregard standard applied by other courts. *Id.*

This Court has noted that no significance is to be accorded to statements made in congressional hearings which are not made by a member of Congress or included in the official Senate and House Reports. *Kelly v. Robinson*, 479 U.S. 36, 51 at n.13, 107 S. Ct. 353, 362 at n.13 (1986). In *Kelly*, the Court noted that where an intrusive interpretation of a code section is desired, Congress would have discussed such a change in House and Senate Reports. *Kelly* at 51. The specific intent to overrule the reckless disregard standard was discussed in both houses by members of Congress and included in the official Senate and House Reports set forth above. Both houses specifically referenced *Tinker* and the intent is clear in the legislative history to both § 523(a)(6) and § 523(a)(9) that injuries caused from reckless conduct are dischargeable under § 523(a)(6).

As pointed out by the Eighth Circuit, in its analysis of the legislative history, circuit courts that have reached decisions at odds with the Eighth Circuit failed to pay sufficient attention to the legislative history. (Pet. App. A-36). Moreover, those courts did not give appropriate weight to the well-established interpretational rule that exceptions to discharge are to be strictly construed so as to give maximum effect to the policy of the Bankruptcy Code to provide debtors with a "fresh start". (Pet. App. A-36).

The Eighth Circuit specifically referred to the cases of *In re Perkins*, 817 F.2d 392 (6th Cir. 1987) and *In re Franklin*, 615 F.2d 909 (10th Cir. 1980), *on remand*, 726 F.2d 606 (10th Cir. 1984). The *Franklin* court did not conduct any review of the legislative history of 11 U.S.C. § 523(a)(6). The *Perkins* court relied upon the *Franklin* decision and did not conduct its own review of the legislative history. In both *Perkins* and *Franklin*, the debtors had committed medical malpractice and tried to cover up their mistakes by falsifying records. *Perkins*, 817 F.2d 392, 393 and *Franklin*, 726 F.2d 606, 610. Commentators have warned that they suspect that legal judgment in some cases is influenced to a considerable degree by the court's own feeling of moral outrage. 2 *Bankruptcy* § 7-30 (Epstein, *et al.*, 1992).

This distinction was also made by the bankruptcy court in *In re Strybel*, 105 B.R. 22 (9th Cir. B.A.P. 1989) where the court held dischargeable a judgment debt owed by a doctor to his patient. The *Strybel* court distinguished *Franklin* and *Perkins* by the "nature" of the physician's conduct. *Id.* at 24. In both *Franklin* and *Perkins*, malice could be implied not only from the medical malpractice but from the fact that both the physician in *Franklin* and the physician in *Perkins tried to cover up their mistakes* in medical treatment in order to avoid possible liability. *Strybel*, 105 B.R. at 24. In *Strybel*, the nature of the physician's conduct was not sufficient to imply malice. *Id.* The same is true in the case at bar.

The only reference to any legislative history in *Perkins* or *Franklin* is in the concurring opinion of *Perkins* where Circuit Judge Engel stated that while the doctor's conduct was appalling, it was not a willful and malicious injury. *Perkins* at 395. Instead, the conduct constituted reckless disregard of a professional duty of care "a type which Congress indicated, at least in its legislative history, was subject to dischargeability." *Id.* The concurrence, noting that uniformity was important, stated that "it is more important that the applicable law be settled than that it be settled

right." *Id.* This explains the reason for the improper interpretation in *Perkins*.

The Eighth Circuit examined the legislative history of § 523(a)(6) in a previous case, *Cassidy v. Minihan*, 794 F.2d 340, 344 (8th Cir. 1986). *Cassidy* involved the question of whether a debt which was the result of a drunk driving liability was dischargeable. *Id.* Section 523(a)(9) was not in effect at the time the *Cassidy* bankruptcy was filed. The court noted the legislative history of both Houses and determined that reckless conduct was dischargeable absent a showing the debtor acted with intent to inflict injury. *Id.* at 343. In *Cassidy*, 794 F.2d at 344, the court stated:

> Finally, we find it particularly significant that the proposed amendment became section 523(a)(9) of the Code and created a new exception to discharge: it did not amend section 523(a)(6) of the Code. We conclude that by section 523(a)(6) of the Code, the 95th Congress intended to *bar the discharge of intentionally inflicted injuries*.

(Emphasis added).

The decision of the Eighth Circuit is well-founded in the legislative history which discharges reckless conduct. The Eighth Circuit's application of the facts, as found by the bankruptcy court, results in nothing more than a determination that Dr. Geiger's conduct was at worst reckless. Such reckless conduct cannot fall within the definition of a willful injury under § 523(a)(6).

C. The Decision In *Tinker* Is Not Applicable To The Instant Case.

1. Even If Congress Had Not Overruled Tinker In The Legislative History, The Holding In Tinker Is Limited To Its Facts.

In *Tinker v. Colwell*, decided in 1904, the issue before the court was whether a judgment debt for criminal conversation was dischargeable. The debtor, Charles Colwell had seduced Mrs. Tinker. Mr. Tinker obtained a judgment against Colwell for the seduction of his wife. The court initially discussed the type of action (*i.e.* whether a trespass or an assault had occurred). In reviewing the case law in effect at that time, the court determined that criminal conversation was

> an actual trespass upon the marital rights of the husband, although the consequent injury is really to the husband on account of the corruption of the body and mind of the wife . . . the consent of the wife makes no difference.

Tinker at 483.

The injury was an invasion to the husband's exclusive right to marital intercourse. *Id.* at 484. The Petitioner cites to the following language in *Tinker* to define willful and malicious injury:

> There may be cases where the *act* has been performed without any particular malice towards the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the *act itself necessarily implies* that degree of malice

which is sufficient to bring the case within the exception stated in the statute. The *act* is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.

In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.

In *Bromage v. Prosser*, 4 Barn. & Cres. 247, which was an action of slander, Mr. Justice Bayley, among other things, said:

> "Malice, in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. And if I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not. . . ."

> We cite the case as a good definition of the legal meaning of the word malice. The law will, as we think, imply that degree of malice in an *act of the nature under consideration*, which is sufficient to bring it within the exception mentioned.

Tinker at 485 and 486 (emphasis added).

The "type" of act, criminal conversation, was the focus of the definition set forth above. It is easy to see how a court could imply malice from such an act. The above-referenced examples set forth by Justice Bayley all consisted of acts done with an intent to cause injury. Justice Bayley is simply making the point that it is not necessary that the intentional tortfeasor know the ultimate person he is injuring because it is obvious an injury occurred to someone upon committing the act. It would not matter whether the debtor knew Mr. Tinker because the moment he had intercourse with Mr. Tinker's wife, the injury to the marital right occurred. The malice or intentionally targeted injury is automatic, so it is implied. The injury goes to the marital right and thus to Mr. Tinker.

The nature of Dr. Geiger's act, prescribing oral penicillin instead of intravenous penicillin, is not such an act that malice can be implied. The actions of Dr. Geiger did not result in an "automatic" intentionally targeted injury; and, therefore, do not bring the actions within the § 523(a)(6) exception.

Even applying the definition of malice as set forth in *Tinker*, Dr. Geiger's debt should be dischargeable because Dr. Geiger had just cause or excuse for his actions. Dr. Geiger believed that the treatment was curing his client because he thought that

the infection had burned itself out and that his patient was absorbing the medication through her stomach well enough to effect a cure. (Pet. App. A-2, A-3, A-34). Dr. Geiger's treatment was also limited by his patient's financial constraints.

The *Tinker* court further limits its holding to the "type of act" before the court by saying,

> *[I]t is not necessary* to the construction we give to the language of the exception in the statute to hold *that every willful act* which is wrong implies malice . . . The injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an *offense* of the most *aggravated character*; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the *very act itself*, and we think Congress did not intend to permit *such an injury* to be released by a discharge in bankruptcy.
>
> An action to redress a wrong of *this character* should not be taken out of the language of such exception.

Tinker, 193 F.2d at 489 and 490, emphasis added. The constant focus of *Tinker* was on the type of injury, criminal conversation. The implied malice standard is an outgrowth of the limited factual situation before the court in *Tinker*.

In the case at bar, a judgment was originally entered against Dr. Geiger based upon the negligent care of his patient. The Petitioner then sought to characterize such negligent care as a

willful and malicious injury under § 523(a)(6). Negligence is defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. Restatement (Second) Torts § 282. Comment (a) to § 282 states that negligent conduct may consist of either an act or an omission to act when there is a duty to do so. The character of Dr. Geiger's conduct was negligent and could not rise to the level of a willful and malicious injury. His conduct was also not of such an aggravated character so as to imply malice.

Further support for limiting the *Tinker* holding to its facts comes from subsequent Supreme Court decisions in *Davis* and *McIntyre* in which the phrase "willful and malicious injury" was reviewed. In *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S. Ct. 151, 79 L. Ed. 393 (1934) the Court held a debt for conversion dischargeable, where the debtor had sold a vehicle and failed to pay the proceeds to the secured lender. The Court in *Davis* reviewed *McIntyre v. Kavanaugh*, 242 U.S. 138, 37 S. Ct. 38, 61 L. Ed. 205 (1916), in determining whether the debtor was liable for a willful and malicious injury as a result of conversion. *Davis* at 332. *McIntyre* and *Davis* are the only two other cases where this Court has analyzed the willful and malicious injury exception to discharge. *Davis* stated that a willful and malicious injury does not follow as a matter of course from every act of conversion without reference to the circumstances. *Davis* at 332. In focusing on the character of the act, the Court concluded that a "discharge will prevail as against a showing of conversion without aggravated features." *Id.* There were no aggravated factual circumstances in *Davis* or *McIntyre* sufficient to imply malice.

Similarly, there are no aggravated factual circumstances in this case. Dr. Geiger did not commit an automatic injury in the sense that Colwell did the instant he committed criminal conversation. Dr. Geiger's treatment of his patient was justified

by his belief that the course of treatment he was following was curing his patient. Dr. Geiger's choice of treatment is not of the same type of conduct as in *Tinker* that implies malice.

Tinker in several instances combined the definition of willful and malicious injury together. For instance, the court stated:

> Upon that principle, we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception.

Tinker, 193 F.2d at 487. This definition even uses the word willful to define willful. The above definition also requires an intentional act which "necessarily causes injury." Dr. Geiger's prescribed treatment did not necessarily cause the injury. (Pet. App. A-35). No facts exist in the record to support the conclusion that Dr. Geiger intended to injure the Petitioner or that he knew his actions were substantially certain to result in the Petitioner's injury. (Pet. App. A-35). The definition also states that the act must be against good morals. Nothing in the record suggest any moral wrongdoing on the part of Dr. Geiger. The "moral" requirement once again shows the Court's limited focus only on the act of criminal conversation in defining willful and malicious injury. Accordingly, the debt owed by Dr. Geiger, which was not the result of any aggravated circumstances, should be discharged.

2. The Legislative History Of 11 U.S.C. § 523(a)(6) Overruled Tinker.

As set forth above, Congress specifically overruled the reckless disregard standard. Congress also stated in legislative

reports to § 523(a)(6) that it intended the word "willful" to mean "deliberate or intentional." S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, and H. R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963. Thus, Congress is requiring a deliberate or intentional injury before a debt can be deemed nondischargeable. The debt owed to the Petitioner cannot be said to be the result of an intentional injury inflicted by Dr. Geiger. Congress specifically referenced, in the legislative history to § 523(a)(6), the *Tinker* case stating:

> To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902) [sic 193 U.S. 473, 24 S. Ct. 505, 48 L. Ed. 754 (1904)] held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

H. R. Rep. No. 595, 95th Cong., 1st Sess. 365, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320-21; S. Rep. No. 989, 95th Cong. 1st Sess. 79, *reprinted* at 1978 U.S.C.C.A.N. 5787, 5864-5865. Clearly, the *Tinker* standard is not applicable and assuming Dr. Geiger's conduct was, at worst reckless, the debt is dischargeable.

Numerous circuit court cases have ruled consistent with the intent of Congress as set forth in the legislative history. *See, e.g. In re Walker*, 48 F.3d 1161 (11th Cir. 1995); *In re Pasek*, 983 F.2d 1524 (10th Cir. 1993); *In re Compos*, 768 F.2d 1155 (10th Cir. 1985). A number of bankruptcy courts have likewise followed suit. *See, e.g., In re Cecchini*, 37 B.R. 671, 674-75 (Bankr. 9th Cir. 1984); *In re Poore*, 37 B.R. 246 (Bankr. D.N.M. 1982); *In re Kuepper*, 36 B.R. 680 (Bankr. E.D. Wis. 1983); *In re Hoppa*, 31 B.R. 753 (Bankr E.D. Wis. 1983); *In re Davis*, 26 B.R. 580 (Bankr. D.R.I. 1983); *In re Silas*, 24 B.R. 771 (Bankr. N.D. Ala. 1982); *In re Maney*, 23 B.R. 61 (Bankr. W.D. Okla.

1982); *In re Morgan*, 22 B.R. 38 (Bankr. D. Neb. 1982); *In re Bratcher*, 20 B.R. 547 (Bankr. W.D. Okla. 1982); *In re Bryson*, 3 B.R. 593 (Bankr. N.D. Ill. 1980); *In re Hodges*, 4 B.R. 513 (Bankr. W.D. Va. 1980).

D. The Analysis Of The Eighth Circuit Was Not Flawed.

The Eighth Circuit analyzed the definition of willful as set forth in the Congressional Record. (Pet. App. A-33). The legislative reports state that "willful" means "deliberate" or "intentional." (Note, this definition is not significantly different from the *Tinker* definition of "willful," which is, "intentional or voluntary." *Tinker*, 193 F.2d at 485.) The Eighth Circuit in rejecting the alternative construction of requiring an "intentional act that results in injury" rather than an "act with intent to cause injury," stated that adopting such an alternative construction would render virtually all tort judgments exempt from discharge. (Pet. App. A-33 & A-34). The court further stated such an analysis would go too far toward rendering a knowing breach of contract nondischargeable. *Id.* The court analogized that a driver who turns into oncoming traffic without looking up into oncoming traffic would commit an intentional tort under the alternative construction. *Id.* The Petitioner argues that such a driver does not *intend* to turn into oncoming traffic but does so accidentally. The driver nonetheless intended to turn which points out the *flaw* in the alternative construction. At what point does the intentional act begin? The Petitioner's argument supports the Eighth Circuit analysis because it would require an act with intent to cause injury.

The Eighth Circuit analyzed the facts of this case as follows:

> In our case, there is no suggestion whatever that Dr. Geiger desired to cause the very serious consequences that Mrs. Kawaauhau suffered. So much is conceded. If, therefore, he was an intentional tortfeasor as we have defined that term, he would have to have believed that Mrs. Kawaauhau was substantially certain to suffer harm as a result of his actions. Although the district court opined that "expert testimony" established that Dr. Geiger's conduct was "certain or substantially certain to cause physical harm," that is not enough. There is nothing in the record, so far as we can tell, that would support a finding that Dr. Geiger *believed* that it was substantially certain that his patient would suffer harm. Indeed, he testified that he believed that Mrs. Kawaauhau was absorbing the penicillin that she was taking orally well enough to effect a cure.
>
> Dr. Halford, moreover, never testified, except in response to a very leading question, that the harm that Mrs. Kawaauhau suffered was a substantially certain consequence of Dr. Geiger's course of treatment. What Dr. Halford said in the main portion of his testimony was that it was a necessary result of that treatment that the infection would "progress at a much more rapid rate and more viciously than otherwise." He also said that, in this case, the treatment "resulted in her requiring amputation to save her life and in permanent kidney damage," but *he did not say that that was a necessary result of the treatment, only, as we understand the testimony, a result of the progress of the infection.* We suspect that the course and consequences of an infection are notoriously difficult to predict, but even if Dr. Halford had testified that Dr. Geiger's treatment necessarily (that is, inevitably) led to Mrs. Kawaauhau's injuries, plaintiff's proof still falls short of the mark. As we have indicated, the real question

> is whether Dr. Geiger believed that these consequences were substantially certain to occur at the time that he attempted his treatment, and the record simply will not support the conclusion that he did. This is an important distinction, one in fact that defines the boundary between intentional and unintentional torts: Even if Dr. Geiger should have believed that his treatment was substantially certain to produce serious harmful consequences, he would be guilty only of professional malpractice, not of an intentional tort.

(Emphasis added) (Pet. App. A-34 & A-35). Nothing in the record suggests that intravenous penicillin would have definitely saved the Petitioner's leg from such an advanced infection. This is because as speculative as it would have been for Dr. Geiger to have known that the Petitioner would lose her leg as a result of the treatment, it is equally as speculative to state her leg would definitely have been saved. The above-referenced analysis of the Eighth Circuit thoroughly reviews the facts and applies them to the definition of an intentional tortfeasor. Clearly, Dr. Geiger does not fall into that definition.

The Petitioner then points out another definition of willful as requiring an "act which is intentional, knowing, or voluntary, as distinguished from accidental." *United States v. Murdock*, 290 U.S. 389, 394, 54 S. Ct. 223, 225 (1933). *Murdock* was convicted of refusing to give testimony. *Id.* The *Murdock* definition does not go far enough because it must modify the injury. Under the plain meaning analysis discussed earlier willful modifies injury, in the phrase willful and malicious injury. It is an intentional injury that is required under § 523(a)(6), not just an intentional act. The *Murdock* definition of willful as it modifies injury would require an intentional, knowing or voluntary injury. The Eighth Circuit's analysis of the facts in

this case applied to the *Murdock* definition of willful would result in the debt being discharged because there is no evidence that Dr. Geiger knew his treatment would cause the injuries sustained by Petitioner.

The interpretation of willful and malicious injury employed by the Eighth Circuit follows the plain meaning of the statute and the legislative intent.

E. Public Policy Dictates That The Debt Should Be Dischargeable Under 11 U.S.C. § 523(a)(6).

In expounding a statute, the court should not be guided by a single sentence or member of a sentence, but look at the provisions of the whole law, and to its object and policy. *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986), *citing Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222, 106 S. Ct. 2485, 2494, 91 L. Ed. 2d 174 (1986), (*quoting Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 285, 76 S. Ct. 349, 359, 100 L. Ed. 309 (1956), (in turn quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 12 L. Ed. 1009 (1849))).

The main policy reason for the Bankruptcy Code is to give debtors a fresh start, financially unhampered by the pressure and discouragement of preexisting debt. *Perez v. Campbell*, 402 U.S. 637, 648 (1971). The financial rehabilitation of the debtor is a fundamental purpose of the Bankruptcy Code and therefore the statutes are remedial in nature and should be construed liberally in the debtor's favor. *Wukelic v. United States*, 544 F.2d 285, 288 (6th Cir. 1976).

The Petitioner argues that the Eighth Circuit's interpretation of the statute would set a standard where wrongdoers could avoid claims by simply denying that they intended an injury. This is

not true because the courts could still look objectively at the evidence to determine whether there was such an intent. Nothing in the record indicated any intent by Dr. Geiger to harm his patient (Pet. App. A-34).

The Petitioner further conclusively argues that such a restrictive interpretation would provide a shield for debts which has not been contemplated by Congress or the Bankruptcy Code. The legislative history of § 523(a)(6) and § 523(a)(9), clearly indicates that Congress knew reckless conduct was being discharged under § 523(a)(6) and desired to discharge debts resulting from such conduct. That is why Congress did not amend § 523(a)(6) to provide an exception for liabilities caused while driving under the influence of a substance, but instead left § 523(a)(6) in tact and created a separate exception from discharge for such liabilities in § 523(a)(9). (*See* legislative history argument, *supra*).

Petitioner's reliance on *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003 (4th Cir. 1985), which held that the *implied malice* standard of *Tinker* was still good law, is irrelevant because the Eighth Circuit decision did not reach the issue of malice. (Pet. App. A-37). The Eighth Circuit Opinion required an intentional tort for the injury to be considered "willful." (Pet. App. A-36). Based on the Eighth Circuit's review of the evidence, the Petitioner was unable to get passed the first prong because there was no willful injury. The court in *St. Paul Fire & Marine Ins. Co.*, acknowledged that the *Tinker* holding, as it related to the "willful" prong, had been overruled. *Id.* at 1009.

In the *Delaney* case, cited by the Petitioners, the district court specifically found the injury to be the result of an accident. *Delaney v. Corley*, 185 B.R. 521, 523 (W.D. La. 1995), *aff'd*, 97 F.3d 800 (5th Cir. 1996). Clearly, an accidental injury will be found dischargeable under § 523(a)(6). Accidental injuries cannot be "willful" under any definition.

Finally, the Petitioners look to Hartley as a good policy argument. *In re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987), *aff'd*, 100 B.R. 477 (W.D. Mo. 1988), *rev'd*, 869 F.2d 394 (8th Cir. 1989), *vacated, and rev'd*, 874 F.2d 1254 (8th Cir. 1989) (en banc). In *Hartley*, the court reasoned that there was specific intent by the debtor to injure the creditor. *Id.* The debtor in *Hartley* threw a firecracker at the creditor intending to scare or startle the creditor. *Id.* The only question was whether the debtor intended to injure the creditor to the extent of the injuries suffered. The court reasoned that if the requisite intent to injure is present, it does not matter that debtor only intended a small injury rather than the resulting vast injury. *Id.* The *Hartley* district court holding was based on an analysis of the Restatement of Torts (Second) § 8A, similar to the Eighth Circuit's analysis in this case. The reasoning in the case at bar follows the *Hartley* analysis. *Id.* If, as the Petitioner claims, the *Hartley* case is instructive, then an intentional injury is required.

The Petitioner attempts to persuade this Court that "morally" it should reject the Eighth Circuit's standard. First, the Petitioner's analysis is muddled because it confuses the concepts of willful injury and malicious injury. Secondly, as set forth in *Citizens Bank and Trust Co. of Flippin v. Lewis*, 17 B.R. 46, 49 (1981), no court can be wiser than the law which it is bound to effect. Congress in the legislative history of § 523(a)(9) noted the loopholes in § 523(a)(6) that allow a debtor to discharge even willful reckless conduct. Congress chose to only partially close that loophole by enactment of § 523(a)(9). This Court can only act within the confines of the language of § 523(a)(6). It is for Congress to make the changes suggested by the Petitioner.

Finally, the requirement by the Eighth Circuit of an intent to cause injury follows the theory of providing a fresh start. To follow the alternative construction of merely requiring an intentional act which results in injury would be to hold non-

dischargeable every act which is not the result of a spasm or involuntary movement. (Pet. App. A-3 & A-34). No such interpretation can be found in the statute. To say that Dr. Geiger committed a willful injury because he prescribed a course of treatment he believed was effective would be to make virtually every malpractice case nondischargeable. At some point under the alternative construction, an intentional act would have to be involved. Perhaps some courts would go so far as to say a surgeon reaching for an instrument too fast and causing it to slip would be an intentional act. Clearly, this was not the underlying policy in creating this exception. If it was, the effect would be over administration of tests on patients and increased medical costs. Ultimately, patients such as Petitioner, who did not have medical insurance, would either not seek medical treatment or wait until it might be too late to seek treatment.

Finally, Petitioner claims such a discharge is only for the honest and unfortunate debtor. Dr. Geiger's actions were honest and based upon the belief he was healing his patient. Nothing in the record suggests any dishonest act by Dr. Geiger such as in the cases where the doctors lied about their qualifications or falsified medical records. His intentions were purely and simply to help his patient. Dr. Geiger has lived under the burden of this debt for over a decade. He is entitled to a fresh start.

CONCLUSION

In order for a debt to be held nondischargeable under 11 U.S.C. § 523(a)(6) it must have been caused by a willful and malicious injury. The injury suffered by Petitioner was not intentionally caused by Dr. Geiger and therefore not a willful injury. The injury must be both willful and malicious to be nondischargeable. Since the Petitioners have not proven, much less alleged, Dr. Geiger intended to cause the injury to Petitioner, the debt must be held dischargeable.

Even if the Petitioners had been able to establish a willful injury, the injury was not malicious. The injury was not intentionally inflicted or necessarily the result of the treatment. The course of treatment used was also not without just cause or excuse. Dr. Geiger believed, based on test results that his course of treatment was curing the Petitioner. Dr. Geiger's selection of oral penicillin rather than intravenous penicillin was further dictated by the Petitioner's limited financial resources.

The Eighth Circuit's interpretation of willful injury as requiring an intent to cause an injury is well founded in the overall policy of providing debtors with a fresh start. It is also the natural way to define the statute. An alternative construction of requiring only an intentional act which results in injury would cause virtually every voluntary act to be nondischargeable if an injury resulted. Dr. Geiger honestly believed that when he administered the various medications he would save Petitioner's leg. Accordingly, the decision of the United States Court of Appeals should be affirmed because Dr. Geiger did not commit a willful and malicious injury.

Respectfully submitted,

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No. 97-115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET KAWAAUHAU AND SOLOMON KAWAAUHAU,
Petitioners,

v.

PAUL W. GEIGER,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 900 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 150,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the purpose of protecting the rights of consumer bankruptcy debtors.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues which can not adequately be addressed by individual member attorneys.

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low- and moderate-income wage-earners. For such debtors, a determination that a debt is non-dischargeable in many instances acts as a serious impediment to obtaining a fresh start. In the case of tort liability, such debts are often substantial thereby subjecting the debtor to many years of post-petition wage garnishments and further collection activity. For this reason, *amicus* supports the decision below which narrowly construes the "willful and malicious injury" exception to discharge.

Additionally, NACBA membership is particularly interested in the application of this discharge exception to

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[1] All parties to this case have consented to the filing of this brief. Letters indicating consent have been submitted contemporaneously. This brief has not been approved or financed by any party to this case or their counsel.

the breached security agreement cases. *Amicus* is concerned about potential creditor misuse in consumer bankruptcy cases of a ruling such as the petitioner seeks in this case. A loose standard based on the concept of "reckless disregard" or "knowing disregard" which has found favor with some bankruptcy courts could result in a proliferation of non-dischargeability actions alleging conversion brought by secured creditors with nominally-secured interests in personal property.

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals, in the decision below, correctly decided that the respondent's liability was dischargeable. Following the well-established rule that exceptions to discharge must be narrowly construed, the court below applied the language of the statute in a manner which gives effect to its plain meaning. The word "willful" is commonly understood to mean acts which are intentional and deliberate as distinguished from those which are negligent or reckless. Since "willful" modifies the word "injury," § 523(a)(6) excepts from discharge only those acts which are intended to cause injury rather than intentional acts which result in injury.

As such, the court below appropriately developed a standard which incorporates the concept of an intentional tort. Thus, unless a debtor intends to cause the "consequences of his act," or knows or believes that the "consequences are substantially certain to result from it," the debtor has not committed an intentional tort and any liability arising out of the conduct should not be excepted from discharge.

The standard set forth by the court below differs from that found in the pre-Code caselaw. Based on

language in *Tinker v. Colwell* which construed the "willful and malicious injury" language in the 1898 Bankruptcy Act, courts routinely held that debts stemming from a "reckless disregard" or "knowing disregard" of a duty, and from conduct involving "implied malice", were excepted from discharge. This led to decisions in which debts based on mere negligence or recklessness, such as in automobile cases, were found to be non-dischargeable.

The enactment of the Bankruptcy Code changed the landscape upon which the pre-Code cases were decided. If there had been doubt as to the meaning of the "willful and malicious injury" language prior to the enactment of the 1978 Bankruptcy Code, Congress made clear its intent in reenacting the statutory language. In the authoritative Committee Reports accompanying the passage of the Bankruptcy Code, Congress explicitly stated that the word "willful" in the statute is to mean "deliberate and intentional," and to the extent that *Tinker v. Colwell* held that a "less strict" (Senate) or "looser" (House) standard is intended, and to the extent other courts have followed *Tinker* in applying a "reckless disregard" standard, "they are overruled." The meaning of this legislative history could not be more clear.

This legislative intent to overrule the *Tinker* line of cases is bolstered by subsequent amendments to § 523(a). In reaction to cases which followed the 1978 legislative history and concluded that drunk driving injuries are generally not excepted from discharge under § 523(a)(6), Congress enacted a new exception found at § 523(a)(9). By creating a special and limited exception for drunk driving cases, rather than amending or clarifying § 523(a)(6), Congress reaffirmed its prior intent that negligence and recklessness do not fall within the "willful and malicious injury" exception to discharge.

Finally, the thoughtful and well-reasoned decision of the Court of Appeals in this matter should be affirmed in that it is consistent with § 523(a)(6)'s dual purposes of providing debtors a fresh start and protecting victims of intentional torts from discharge of claims based on willful and malicious injuries.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE EXEMPTS FROM DISCHARGE ONLY THOSE DEBTS RESULTING FROM AN INTENT TO CAUSE INJURY.

A. *Exceptions To Discharge Should Be Narrowly Construed.*

The principal goal of most bankruptcy cases is the entry of a discharge, a purpose which is consistent with the policy of providing debtors with an opportunity for a fresh start. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). The availability of a discharge, however, is not absolute; there are certain limited categories of debts which the Bankruptcy Code deems to be excepted from discharge. 11 U.S.C. § 523(a).

A well-established doctrine in bankruptcy law provides that exceptions to discharge should be narrowly construed. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed...."). *See also In re Klein*, 65 F.3d 749 (8th Cir. 1995); *In re Walker*, 48 F.3d 1161 (11th Cir. 1995); *In re Ward*, 857 F.2d 1082 (6th Cir. 1988); *In re Black*, 787 F.2d 503 (10th Cir. 1986). There is no sound reason why this guiding principle of statutory construction should not be followed in this case.

B. *This Court's Inquiry Need Go No Further Than An Examination Of The Plain Language of § 523(a)(6).*

As in all cases of statutory construction, the starting point in this case must be the statutory language. *Toibb v. Radloff*, 501 U.S. 157 (1991); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989). "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." *Ron Pair*, 109 S.Ct. at 1031 (*quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Section 523 (a)(6) excepts from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." Key to the analysis of this subsection are the words "willful and malicious" in relation to the word "injury." As several courts have correctly noted, including the court below, the word "willful" modifies "injury" in the sentence. *In re Geiger*, 113 F.3d 848, 852 (8th Cir. 1997); *In re Walker*, 48 F.3d 1161, 1164 (11th Cir. 1995); *In re Conte*, 33 F.3d 303, 307 (3rd Cir. 1994); *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985). Given its normal construction, then, the phrase must mean an act which is intended to cause injury rather than simply an intentional act that results in injury. Had Congress intended the latter

construction, the statutory language would more likely have read: "for willful and malicious acts which cause an injury." *Walker*, 48 F.3d at 1164, *quoting In re Hampel*, 110 B.R. 88, 93 (Bankr.M.D.Ga. 1990).

In normal usage, "willful" connotes an act which is done intentionally or knowingly, as opposed to an act done recklessly or negligently. *See* Black's Law Dictionary, 6th Edition. Accordingly, the court below appropriately determined that the statutory language excepts from discharge only those debts which are "based on what the law has for generations called an intentional tort." *Geiger*, 113 F.3d at 852. Referring to the definition of an intentional tort provided in the *Restatement (Second) of Torts*, the court below stated:

> Unless the actor 'desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it,' he or she has not committed an intentional tort.

Id., *quoting Restatement (Second) of Torts* § 8A, comment a, at 15 (1965). [2]

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[2] The dissent below notes that while the majority interprets this section of the Restatement to require a subjective intent to injure, it fails to discuss the following statement in comment b:

> If the actor *knows* that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. (emphasis added)

Restatement, supra, comment b. This comment fails to support the dissent's argument. The language is consistent with comment a as it still describes a subjective intent.

Amicus believes that the standard set forth by the court below is consistent with the plain meaning of the statutory language. [3]

II. THE LEGISLATIVE HISTORY OF § 523(a)(6) SUPPORTS AFFIRMANCE.

A. *Tinker v. Colwell And The Pre-Code Caselaw.*

In *Tinker v. Colwell*, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904), this Court interpreted the "willful and malicious injury" language as contained in the Bankruptcy Act of 1898. In finding that liability resulting from the "criminal conversation" of the debtor with the plaintiff's wife was non-dischargeable, this Court used the following language in describing the exception to discharge:

> ... we think a wilful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be

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[3] The court below did not consider the "malicious" element of the exception as it correctly found that a determination of the "willful" requirement was dispositive in this case. While the application of the malice component is very fact specific, *amicus* notes that the Eighth Circuit has required, at least in the context of the breached security cases, a "heightened level of culpability ... going beyond recklessness." *In re Long*, 774 F.2d 875, 881 (8th Cir. 1985).

> done wilfully and maliciously, so as to come within the exception.
>
> *Id.* at 487, 24 S.Ct. at 509.

Effectively, the *Tinker* court concluded that there are certain kinds of wrongful acts in which "the law implies that there must be malice." *Id.* at 490, 24 S.Ct. at 510.

Based more on the *dicta* rather than the strict holding in *Tinker*, there developed a line of cases which held that a "willful" injury could be established by a showing of the debtor's reckless disregard of duty. [4] *See, e.g., Harrison v. Donnely*, 153 F.2d 588 (8th Cir. 1946) (law may imply that negligent act evincing reckless indifference to rights of others is done intentionally); *Den Haerynck v. Thompson*, 228 F.2d 72 (10th Cir. 1955) (injury from reckless operation of automobile non-dischargeable); *Bennett v. W.T. Grant Co.*, 481 F.2d 664 (4th Cir. 1973) (act of conversion done intentionally in knowing disregard of rights of another is willful and malicious).

B. *In Enacting The 1978 Bankruptcy Code, Congress Expressly Rejected the Tinker Line of Cases.*

The enactment of the Bankruptcy Code caused most courts to reassess their prior reliance upon the *Tinker* line

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[4] It is worth noting that the *Tinker* court described a "willful" disregard as opposed to a "reckless" disregard, language which is more consistent with the lower court's standard based on an intentional tort rather than with the standard adopted by the cases purporting to follow *Tinker*. Moreover, the actual conduct in question in *Tinker* involved an intentional tort.

of cases. As the Third Circuit recognized, "[t]he landscape has changed in the wake of the 1978 Bankruptcy Code." *In re Conte*, 33 F.3d 303, 306 (3rd. Cir. 1994). Although the "willful and malicious injury" language was incorporated into the Bankruptcy Code, both the House and Senate Committee Reports accompanying the bill contain an explicit statement as to the intent of Congress in reenacting the statutory language. More precisely, the Committee Reports flatly reject the standard perpetuated in the *Tinker* line of cases:

> Paragraph (5) provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another are nondischargeable. Under this paragraph 'willful' means deliberate or intentional. To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902), held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled.

Sen. Rept. No. 95-989, 95th Cong., 2d Sess. (1978), 77-99, U.S.Code Cong. & Admin.News 1978, 5787, 5865; also House Rept. No. 95-595, 95th Cong., 1st Sess. (1977), p. 363, U.S. Code Cong. & Admin.News 1978, 5787. [5]

This clear expression of legislative intent resolves that for purposes of § 523(a)(6) analysis, "willful" shall mean an act which is done deliberately or intentionally. This distinguishes those acts which are the product of a "reckless disregard" or a "knowing disregard." Congress

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[5] The House Committee Report is identical to that of the Senate except that the phrase "looser standard" is substituted for the Senate Report's "less strict standard."

noted its dissatisfaction with those cases which had adopted a "less strict" standard based on recklessness and stated that they were overruled. [6] *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985)("[w]e hold that the legislative history of § 523(a)(6) ... expressly establishes Congress's intent to render obsolete *Tinker* and its progeny and to make the "reckless disregard" standard ... inapplicable...."); *Cassidy v. Minihan*, 794 F.2d 340, 343-344 (8th Cir. 1986)("[w]e believe that the report of the Committee on the Judiciary persuasively indicates Congressional intent to allow discharge of liability for injuries unless the debtor intentionally inflicted an injury."); *In re Quezada*, 718 F.2d 121 (5th Cir. 1983).

It is of particular note that the pertinent legislative history came in the form of a Committee Report. In *Garcia v. United States*, 469 U.S. 70, 76 (1984), the Court stated:

> In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'

citing Zuber v. Allen, 396 U.S. 168, 186 (1969), *see also Thornburg v. Gingles*, 478 U.S. 30, (1986).

The petitioners argue that the legislative history overruling the *Tinker* line of cases should be discredited

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[6] While the dissent in the decision below notes that this passage from the legislative history provides only a "brief reference to the meaning of § 523(a)(5)", *Geiger*, 113 F.3d at 857, it is nonetheless pointed and unambiguous.

because Congress did not change the "willful and malicious injury" language when enacting the 1978 Bankruptcy Code, citing to *Kelly v. Robinson*, 479 U.S. 36, 37 (1986) for the view that if Congress "intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." In fact, however, that is exactly what Congress did. It is hard to imagine a more clear expression of legislative intent in overturning prior precedent.

This is not a case, such as in *United Savings v. Timbers of Inwood Forest*, 484 U.S. 365, 380 (1988), where a construction of statutory language differing from pre-Code caselaw is proposed "without even any mention in the legislative history." On the contrary, Congress has spoken loudly and clearly in the legislative history.

III. SUBSEQUENT AMENDMENTS TO THE BANKRUPTCY CODE REINFORCE THE INTENT OF CONGRESS AS EXPRESSED IN THE 1978 LEGISLATIVE HISTORY.

The creation of a totally new exception to discharge subsequent to the enactment of the Bankruptcy Code provides further evidence of Congress' intent to effectively overrule the *Tinker* "reckless disregard" line of cases. Section 523(a)(9) was added to the Bankruptcy Code as an additional exception to discharge for debts incurred through drunk driving by the Bankruptcy and Federal Judgeship Act of 1984. [7] Had Congress been of the

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[7] In 1990, the Criminal Victims Protection Act made the exception to discharge applicable in Chapter 13 cases. Pub. L. No. 101-647. *See* 11 U.S.C. § 1328(a)(2). Amendments to § 523(a)(9) contained in the

opinion that a "reckless disregard" standard was the proper interpretation of the "willful and malicious" language in § 523(a)(6), then there would have been no need to enact a new exception dealing with drunk driving.

Prior to the enactment of § 523(a)(9), the prevailing view was that debts based on drunk driving liability were not excepted from discharge unless it could be shown that the debtor intended to cause the resulting injury. *See Cassidy v. Minihan*, 794 F.2d 340, 343 (8th Cir. 1986). Essentially, these cases held that while the act of drinking may be intentional, it does not follow that all debtors who injure others while driving drunk have done so with an intent to inflict injury. Rather, it is more common that such accidents fall within the "reckless disregard" concept of tort liability.

For compelling policy reasons, Congress reacted to this line of cases. It is the way in which Congress responded that is of great significance to this case. As a sign that Congress did not believe that drunk driving debts are necessarily the product of a willful and malicious injury, and as an affirmance of its prior legislative history that § 523(a)(6) does not cover injuries resulting from the reckless disregard of the debtor, Congress enacted a new, stand-alone exception to discharge at § 523(a)(9). *See Cassidy v. Minihan, supra*, 794 F.2d at 344 ("... we find it particularly significant that the proposed amendment became section 523(a)(9) of the Code and created a new exception to discharge: it did not amend section 523(a)(6) of the Code.").

Act also broadened the scope of the exception on the one hand to include unlawful driving while under the influence of a drug or substance and removed the earlier requirement that the debt be evidenced by a judgment, and on the other narrowed it to include only debts for death or personal injury.

In enacting § 523(a)(9), Congress did not intend to simply clarify that drunk driving debts fall within the existing exception in § 523(a)(6), thereby making § 523(a)(9) retroactively applicable, as some courts have held. *See, e.g., In re Adams*, 761 F.2d 1422 (9th Cir. 1985). Such a construction is only supportable if the "willful and malicious injury" language in subsection (a)(6) had been modified or if the amendment was expressly made retroactive. [8] *Cassidy v. Minihan, supra*, 794 F.2d at 344; see also *In re Compos*, 768 F.2d 1155, 1159, f.n. 2 (10th Cir. 1985) (retroactive application of § 523(a)(9) rejected). [9]

In sum, the enactment of the drunk driving amendment reflects the will of Congress to carve out a special exception to fit a particular societal wrong, and not to broaden the scope of § 523(a)(6) to include reckless conduct. [10] *In re Compos, supra*, 768 F.2d 1155, 1158-

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[8] Section 553(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 provided that the amendments to § 523(a) became effective 90 days after the enactment of the Act.

[9] As further evidence that Congress was not simply clarifying that drunk driving dischargeability should be determined under standards established under § 523(a)(6), Congress did not require that such determinations be made solely by the bankruptcy court as is the case for "willful and malicious injury." See 11 U.S.C. § 523(c)(1).

[10] In 1990, Congress enacted the Crime Control Act which added a new exception at § 523(a)(12). Pub. L. No. 101-647. This amendment excepts from discharge debts that arise from a debtor's "malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution...." (emphasis added). Significantly, in describing certain other acts, Congress knew how to say "malicious" and "reckless." If Congress intended to include reckless conduct in § 523(a)(6), it would have said so.

1159 ("...courts have recognized that it is for Congress, not the courts, to amend the Code to make drunk driving debts nondischargeable ... eschew[ing] the temptation to yield to personal preferences....").

IV. EVEN IF *TINKER V. COLWELL* IS STILL GOOD LAW, REVERSAL IS NOT WARRANTED.

Petitioners urge this Court to reaffirm the holding in *Tinker*, which they claim necessarily compels a reversal of the decision below. A close view of *Tinker*, however, suggests that its holding is not entirely consistent and that it is of limited application beyond its factual setting.

To begin with, while *Tinker* is widely viewed as holding that the "willful" element of the exception may include a "reckless disregard" of a duty, the following excerpt from the case calls this into question and tends to blur the distinction some courts have made between the "willful" and "malicious" elements:

> It is not necessary in the construction we give to the language of the exception in the statute to hold that every wilful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. Thus, he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious.

Tinker, 193 U.S. at 489. In the example provided, the act of driving negligently in a crowded thoroughfare would

seem to invoke a "wilful disregard of what one knows to be his duty," yet this is not viewed by the *Tinker* court as reckless enough. Thus, even under a recklessness standard, it not clear in *Tinker* to what degree the act must be sufficiently reckless before malice or willfulness will be implied.

Additionally, the *Tinker* court places great emphasis on the historical significance of the crime and civil tort involved in the case, that of "criminal conversation." Citing to its common law origins, the *Tinker* court refers to the description of criminal conversation in Blackstone as a "civil injury (and surely there can be no greater)..." providing the husband with an "action in trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary." *Tinker*, 193 U.S. at 482. The act was viewed as an injury against both the husband's personal and property rights, [11] an "injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character...." *Tinker*, 193 U.S. at 489-490.

Thus, the *Tinker* court appears to have considered the act under consideration, by its very nature, to have been inherently "willful and malicious," regardless of the circumstances surrounding its commission; and to be far more in the nature of an intentional tort than an act of negligence. The same cannot be said of the negligent acts of Dr. Geiger in this case of medical malpractice. While it is true that Dr. Geiger's treatment of the petitioner

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[11] In this regard, the husband's rights were held to be "of the highest kind, upon the thorough maintenance of which the whole social order rests...." *Tinker*, 193 U.S. at 484.

deviated from the standard treatment, the court below found his conduct to be at best negligent or reckless; and unlike the intentional tort in *Tinker*, he did not believe or know that the injuries were certain or substantially certain to result. The exercise of the respondent's professional judgment, though clearly flawed, did not in the view of the court below reflect the malevolence and depravity that the *Tinker* court found to be manifest "in the very act itself." 193 U.S. at 490.

Even under an objective evaluation of Dr. Geiger's actions, which is advocated by the dissent, the court below observed that the expert testimony in the bankruptcy court did not conclude that the petitioner's injuries were substantially certain to occur based on the treatment provided. *Geiger*, 113 F.3d at 853 ("... [the expert] did not say that that was a necessary result of the treatment, only, as we understand the testimony, a result of the progress of the infection. We suspect that the course and consequences of an infection are notoriously difficult to predict....").

While the respondent may not be the "unfortunate consumer debtor" that *amicus* member attorneys are accustomed to representing, this case does not warrant the adoption of a less strict standard simply based on the particular identity of the debtor or the type of conduct involved. Congress alone may exercise such prerogative.

V. THE DECISION BELOW IS SOUNDLY BASED UPON THE BANKRUPTCY CODE'S PURPOSES AND POLICIES.

Affirmance of the standard adopted by the court below is warranted based on the long-standing public

policy goal of affording honest, but unfortunate debtors a discharge from debts and an opportunity to rehabilitate their financial affairs. At the same time, the standard furthers the goal of protecting the victims of intentional and malicious torts from the discharge of claims based on willful and malicious injuries.

Amicus is concerned that adoption of a less strict standard than that set forth in the decision below will tip the balance against consumer debtors' interests contrary to the legislative purpose of the Bankruptcy Code and unfairly restrict consumer debtors' opportunity for a fresh start. A broad construction of the exception in § 523(a)(6) will prove to be particularly troubling in the breached security agreement cases.

The effect of a less strict standard in the security agreement context is best shown by cases which have continued to follow *Tinker* despite the 1978 legislative history. In *In re Auvenshine*, 9 B.R. 772 (Bankr.W.D.Mich. 1981), a secured creditor brought a non-dischargeability action based on an alleged conversion of secured property. The bankruptcy court found that the debtors sold a washer and dryer for the sum of $250 so as to raise money for the purchase of an automobile which cost $450. Based on the holding in *Tinker*, the court found that the mere "sale of property subject to a security interest by a debtor without payment of the debt so secured is a willful and malicious act." *Id.* at 775. The court reached this conclusion without making any findings regarding the debtors' knowledge of the security agreement, their intent to harm the creditor, or factors

which would suggest the presence or absence of malice (either implied or actual). [12]

In *United Bank of Southgate v. Nelson*, 35 B.R. 766 (N.D.Ill. 1983), the court stated that it was adopting the "implied malice" standard of *Tinker* in conversion cases. The court concluded that the sale of secured property is a "willful and malicious injury" if the debtor "knows his act would harm the creditors interest...." *Id.* at 776. The debtor's knowledge may be "inferred" from factors such as the debtor's business experience and whether he read or understood the security agreement. *See also, Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257 (11th Cir. 1988) (adopting the implied malice approach set forth in *United Bank of Southgate); In re Collins*, 151 B.R. 967 (Bankr.M.D.Fla. 1993) ("an act performed intentionally with knowledge that it will impair a creditor is done willfully and maliciously").

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[12] Although the court in *Auvenshine* noted its approval of *Tinker*, it conspicuously omitted any reference to the more related Supreme Court precedent of *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1935), which if followed would have compelled at least some inquiry into the circumstances surrounding the sale of the secured property. In *Davis*, the Court stated:

> ... a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness and maliciousness.

Id. at 332. This language has caused other courts to conclude that a knowing violation of the legal rights of a secured creditor does not establish malice in conversion cases without some additional "aggravated circumstances." *See e.g., In re Long*, 774 F.2d 875, 881 (8th Cir. 1985).

These cases are clearly inconsistent with the standard developed by the court below in this case and its earlier decision in *In re Long*, 774 F.2d 875 (8th Cir. 1985). *See also In re Hodges*, 4 B.R. 513 (Bankr.W.D.Va. 1980). *Amicus* urges affirmance of the decision below so as to effectively overturn the decisions which have continued to apply the *Tinker* reckless disregard and implied malice standards in § 523(a)(6) conversion cases.

Of particular concern to *amicus* is the increasing use of security agreements in connection with revolving charge accounts at large retail consumer stores. For the most part, consumers are unaware that such consumer purchases are secured or they are not familiar with the terms of the security agreements. [13] Retailers, for their part, do not encourage customer awareness of the security obligations and in fact often promote the use of such charge accounts for the purchase of gifts, which necessarily involves the transfer of possession of secured property in violation of such security agreements. Only in the bankruptcy context do such creditors attempt to hold consumers to the letter of these agreements, threatening post-discharge replevin or non-dischargeability actions based on conversion, often as leverage to obtain a reaffirmation agreement from the consumer.

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[13] This was recently observed by the Bankruptcy Review Commission:

> One might expect that secured debts are easily distinguishable from unsecured debts, but this is not always the case. Individuals with retail charge accounts at some stores might be surprised to learn that every purchase they make is technically a 'secured purchase.'

Report of the National Bankruptcy Review Commission, October 20, 1997, Vol. 1, p. 169.

The threat of non-dischargeability actions in this context was recently identified as a serious problem by the National Bankruptcy Review Commission:

> Nominal security agreements play a large part in another context: allegations of conversion to make an ordinary debt nondischargeable. The following example is often used. An individual purchases a birthday present for his mother and some other items on a retail charge card. A week after presenting his mother with the gift, this individual loses his job, and several months later he files for bankruptcy, having not completely paid off his balance on the retail charge card. Some creditors might allege that because the fine print on the receipt made the debtor's purchases secured debts, the debtor committed the tort of conversion when he gave the gift to his mother and therefore the debt to the retailer is nondischargeable under section 523 (a)(6). Although debtors that are able to defend against these lawsuits attain a fair level of success (citations omitted), if debtors cannot afford to litigate or their attorneys are reluctant to take on that task, the debtors are likely to agree to repay these debts by settling the actions or signing reaffirmation agreements.

Report of the National Bankruptcy Review Commission, October 20, 1997, Vol. 1, p. 173.

If the decision below is overturned, this Court will undermine the defenses available to consumer debtors in

such actions. Affirmance will prevent the flood of non-dischargeability conversion actions which are certain to be filed in bankruptcy courts in the wake of a contrary ruling.

CONCLUSION

For all the foregoing reasons, this court should affirm the decision of the Eighth Circuit.

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No. 97-115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET KAWAAUHAU AND SOLOMON KAWAAUHAU,
Petitioners,

vs.

PAUL W. GEIGER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER' REPLY BRIEF

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II. PETITIONERS' REPLY BRIEF

A. The Bankruptcy Court's Findings of Fact Were Not Held to be "Clearly Erroneous."

At this eleventh hour, Dr. Geiger seeks to retry this case before this Court. There was ample evidence before the bankruptcy court, including Dr. Geiger's testimony, Dr. Halford's expert testimony, and the state court trial testimony for the bankruptcy court to hold that the judgments in favor of the Kawaauhaus are non-dischargeable under 11 U.S.C. §523(a)(6). Dr. Geiger selectively cites to certain testimony before the bankruptcy court, ignoring the fact that the bankruptcy court, in light of the evidence before it, found his testimony not as credible as the other evidence. The court of appeals did not amend the bankruptcy court's findings. Absent a "very obvious and exceptional showing of error," the court of appeals was not free to re-evaluate the evidence present before the bankruptcy court. *Judge v. Prod. Credit Ass'n of the Midlands*, 969 F.2d 699, 700 (8th Cir. 1992). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses and the "clearly erroneous" standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985), cited in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990). Even if the evidence before the bankruptcy court could have been interpreted differently, the court of appeals was required to defer to the bankruptcy court's findings. *In Re LeMaire*, 898 F.2d 1346, 1349 (8th Cir. 1990). Further, the bankruptcy court's findings of fact were not challenged by Dr. Geiger below. The court of appeals' decision was based upon application of its interpretation of law to the bankruptcy court's findings of fact.

Notwithstanding the significant legal barriers to a re-trial on appeal of the factual findings and without burdening this Court with a complete redescription of all the evidence below,[1] the Kawaauhaus note two significant matters on which Dr. Geiger has mischaracterized the evidence.

1. The Evidence Before the Bankruptcy Court Showed that Dr. Geiger's Knowing Administration of Substandard Care Caused Mrs. Kawaauhau to Lose Her Leg.

Contrary to Dr. Geiger's statement that there was no evidence to show that his actions caused the loss of Mrs. Kawaauhau's leg (Respondent's Brief on Merits at 5), Dr. Halford testified at the bankruptcy court trial via deposition that:

> "When Dr. Geiger finally administered penicillin, the drug of choice, he gave it orally to her instead of intravenously. Dr. Geiger admits in his testimony at trial that he knew the use of oral penicillin was not the accepted standard of treatment, and that penicillin intravenously was the accepted treatment. The hospital records and Dr. Geiger's testimony indicate that he took Margaret Kawaauhau off of all antibiotics on January 11, 1983. *Dr. Geiger intentionally administered substandard care to Margaret Kawaauhau that necessarily resulted in advancing the infection in her leg, the loss of her leg, and permanent damage to her kidneys.*" (emphasis added) (Bankruptcy Trial Transcript at page 6 — admitting into evidence Dr. Halford's deposition taken for the bankruptcy court trial affirming his affidavit). (Halford Deposition (Bankruptcy Court Exhibit No. 3) at 6, Exhibit B).

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[1] Note that in their brief on the merits, the Kawaauhaus cite only to the bankruptcy court's opinion while in his brief Dr. Geiger goes behind the findings to the record itself.

The record below is replete with references to evidence of Dr. Geiger's actions. Dr. Geiger testified that he knew the appropriate standard of care, but that he failed to prescribe it; (State Trial Transcript at 38, 40 (Bankruptcy Court Trial Exhibit No. 1)) notwithstanding the fact that he knew that Mrs. Kawaauhau was in grave danger. (Bankruptcy Trial Transcript at 73).

2. The Bankruptcy Court Did Not Believe Dr. Geiger's Rationalization of His Actions on the Cost Theory.

The bankruptcy court found that Mrs. Kawaauhau denied ever having discussed the cost of treatment with Dr. Geiger and Mr. Kawaauhau testified that he had never told Dr. Geiger to keep costs to a minimum in treating Mrs. Kawaauhau's leg. (FN 1, Pet. App. at 15). Furthermore, Dr. Halford testified that:

> [C]ost has a role in what we choose if you have an alternative that is more economically feasible, but cost should have no role in directing your therapeutic efforts when you are dealing with life and death. And to me, that was a gross error that was being made by being concerned about several hundred dollars versus the loss of life and limb. (Pet. App. at 6).

While Dr. Geiger can point to his own statements in the record below to justify his decisions, he adduced no corroborating evidence. The bankruptcy court rejected his testimony.[2]

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[2] Even if this Court were to retry the facts, it is difficult to see how the difference between $4 per day and $40 per day in medication would have been a significant factor to someone already bearing the expenses of a hospitalization with a "life threatening condition." This insignificant cost difference obviously was not a factor to the physicians to whom Dr. Geiger assigned care while he left town to "attend to other business" and who finally prescribed the correct medication and whose decision Dr. Geiger reversed. (Pet. App. at 20).

B. Dr. Geiger's Suggestion that the Enactment of the Exception Under §523(a)(9) Supports His Interpretation of §523(a)(6) is Unfounded.

Dr. Geiger cites the enactment of §523(a)(9) by the 98th Congress as a demonstration of the 95th Congress' intent to require only intentional torts to be excepted from discharge under §523(a)(6).[3] (Respondent's Brief at 16). However, the action of a later Congress does not imply the intent of a previous Congress. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 117-18 (1980).

In addition, the enactment of the "drunk driving" exception under §523(a)(9) is irrelevant to the interpretation of the language "willful and malicious" in §523(a)(6). The §523(a)(9) exception was designed to deal with circumstances not presented here. Dr. Geiger suggests that the interpretation proposed by the Kawaauhaus would make §523(a)(9) superfluous. Dr. Geiger is incorrect in this supposition because while he stretches to draw an inference from Senator DeConcini's statement, the most that can be said is that Congress, concerned over debtors who sought to discharge injuries resulting from driving while intoxicated, wanted to allow victims of such incidents to have an irrebuttable presumption that their debts were excepted from discharge. Such a presumption would not otherwise exist under any other provision of §523(a).

The peril of pointing to a single congressman's comments in a voluminous record is demonstrated by the fact that the amendment which Senator DeConcini proposed was not adopted and one proposed by Senator Danforth was passed as §523(a)(9). In

[3] For a discussion of Congressional intent (or the lack of it) in relation to the Bankruptcy Reform Act of 1978 and the "willful and malicious" exception, *see* Charles Jordan Tabb, "*The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*," 59 Geo. Wash. L. Rev. 56, 76 (1990).

describing the reason for this modified version of the bill, Senator Heflin stated:

> Under existing law, a debt is nondischargeable only if the debt is as a result of a "willful and malicious injury" to the person or property of another. In most states, the act of a drunk driver is grounded in negligence and is thus dischargeable. By making such debts non-dischargeable, we can protect victims of the drunk driver and deter drunk driving. Cong. Rec. S. 5362 (daily edition April 27, 1983).

Accordingly, Congress' intent was not to tinker with the definition of "willful and malicious," but rather to deter driving under the influence and to establish a separate category of a non-dischargeable debt which otherwise might be considered simple negligence under state law and therefore be dischargeable.

C. Where a Word Used in a Statute Has Both a Legal Meaning and Plain Meaning, Congress is Presumed to Have Used the Legal Meaning.

Dr. Geiger argues that the "plain meaning" of the words in question supports his position. But this Court acknowledged the "legal meaning" of the word "malicious" in *Tinker v. Colwell*, 193 U.S. 473, 485-86 (1904). When a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs. *Moskal v. U.S.*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting). *See also, Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 321 (1992). As Justice Jackson explained for the Court in *Morissette v. United States*, 342 U.S. 246, 263 (1952):

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use

will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them."

Justice Frankfurter more poetically put it: "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 537 (1947).

D. Congress Must Act in the Manner Set Forth in the Constitution.

Even if this Court accepts Dr. Geiger's argument that the statements in the legislative reports evidence an intent of Congress to overrule *Tinker*, this intent, without more is ineffective. Our Constitution sets forth the process by which Congress may make laws. The only way to change the meaning of an existing statute is to change its wording. There is no other means by which Congress may constitutionally act. *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("legislative power of Federal Government [must] be exercised in accord with a single, finely wrought and exhaustively considered procedure"). "Legislative intention, without more, is not legislation." *Train v. City of New York*, 420 U.S. 35, 45 (1975).

III. CONCLUSION

Dr. Geiger's efforts to retry the case before this Court and mischaracterize subsequent legislative history and rules of construction is not persuasive. The Court should grant the relief requested by the Kawaauhaus.

Respectfully submitted,

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